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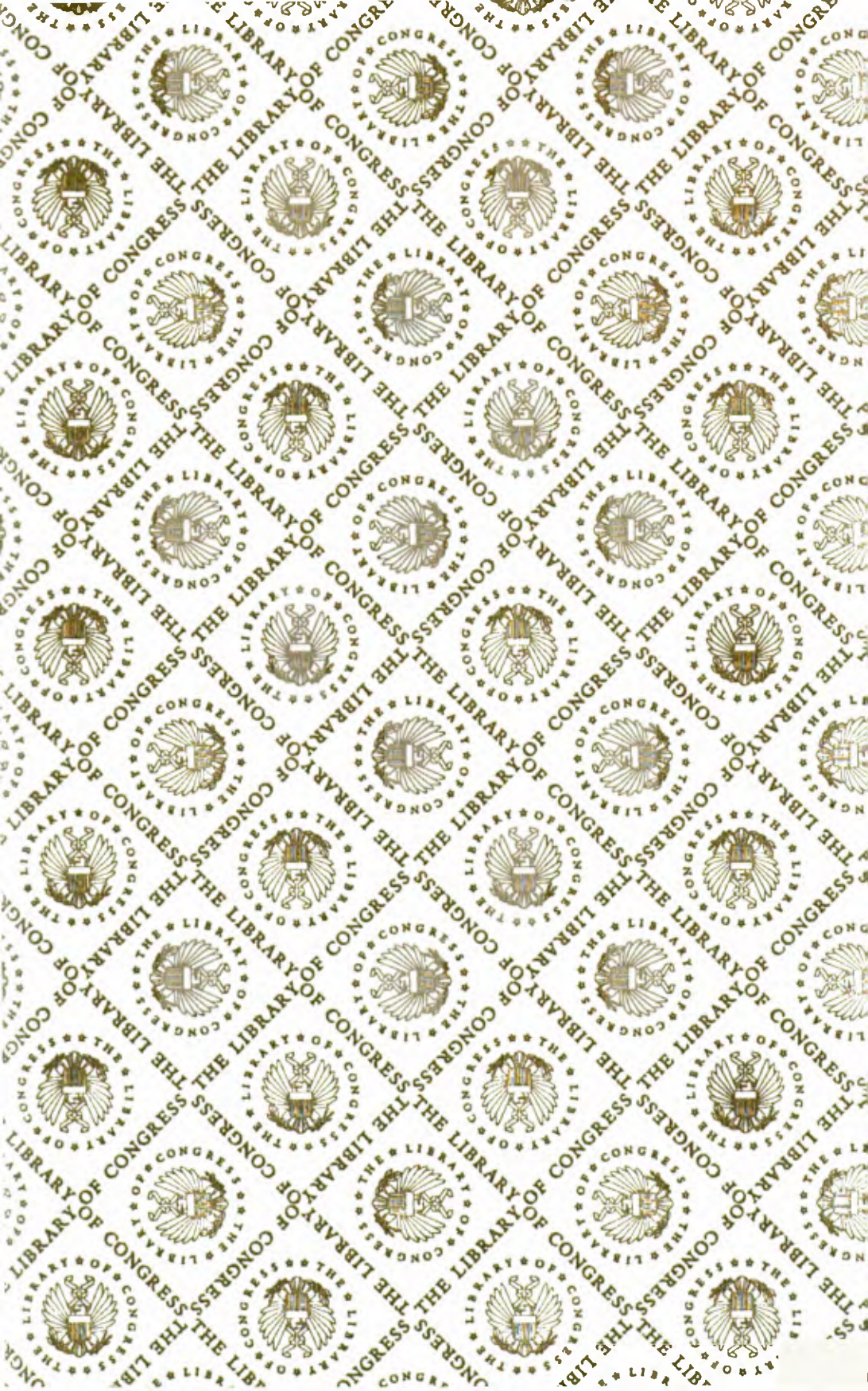
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CRIMINAL FINES AND RESTITUTION: ARE FEDERAL OFFENDERS COMPENSATING VICTIMS?

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

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THURSDAY, MAY 6, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 9:37 a.m., in Room 2237, Rayburn House Office Building, Hon. Bill McCollum [chairman of the subcommittee] presiding.

Present: Representatives McCollum, Gekas, Coble, Smith, Canady, and Scott.

Staff present: Paul J. McNulty, Chief Counsel; Bobby Vassar, Minority Counsel; and Veronica Eligan, Staff Assistant.

OPENING STATEMENT OF CHAIRMAN MCCOLLUM

Mr. MCCOLLUM. The Subcommittee on Crime will come to order. Today we examine one of the most important responsibilities of the criminal justice system, compensating crime victims for the losses they suffer. Justice demands that criminals be punished for their offenses, but also it demands that they restore to their victims, if possible, what has been lost or compensate them for their suffering. If offenders are not being ordered to pay restitution, justice is not being served. Simply that, and nothing more.

Today we will also address another fundamental principle of our criminal justice system. That is the principle of fairness. Fifteen years ago Congress set in motion a process for establishing uniformity in sentencing in the 94 districts throughout the United States. The goal was to ensure that defendants who committed similar crimes would receive similar punishment no matter where they were sentenced.

The Federal sentencing guidelines established in 1987 have gone a long way to achieving this uniformity with regard to prison sentences. Today we will hear that we may still be a long way from the goal of fairness and uniformity in the Federal system when it comes to fines and restitution. We will learn that where an offender is tried will determine in large part whether he will be required to pay a fine or restitution. We will also learn more importantly that restitution may not be ordered by Federal judges as frequently as it should, and strangely enough, was less frequently ordered in 1997, the year after Congress mandated restitution for violent and property crimes in 1996.

This and other important information will be presented to us this morning by officials from the General Accounting Office. For the past 2 years, GAO has been studying several issues relating to orders of restitution and criminal fines imposed on Federal offenders. Senator Hatch and I requested this study because we wanted to know who is being ordered to pay and of those ordered to pay, are they actually doing so.

In its report being released publicly today, GAO describes the enormous diversity that exists across Federal circuit and district courts when it comes to fines and restitution. The report finds that victims in certain Federal districts are far more likely to be compensated for their losses than victims of the same crime in other districts. The report also finds that the odds of being fined in one district may be three or four times greater than in another for the same crime. We must find out if this lack of uniformity, if it can be explained by legitimate differences in the individual cases, we need to find out whether it can be or not or an even deeper, more troubling problem in the Federal criminal justice system.

Representatives from GAO have suggested that certain cultures exist within many Federal districts which may be harmful to the interests of victims. These districts may have longstanding weaknesses in cooperation between the U.S. Attorney's office and the court officials. If this is true, we must ensure that these cultures change.

It should be noted that the Administrative Office of the U.S. Courts was invited to testify in person at today's hearings, but declined to do so. However, the Courts have submitted a statement for the record from Chief Judge George Kazen of the Southern District of Texas. Judge Kazen is the Chairman of the Committee on Criminal Law of the Judicial Conference of the United States. Without objection this statement will be made a part of the record. Hearing no objection, it is so ordered.

I want to thank GAO for its diligent work over the last 2 years and I look forward to hearing from them this morning. I yield to Mr. Scott, our ranking member.

Mr. SCOTT. Mr. Chairman, before I make my remarks, I think you indicated that the administrative arm of the courts have declined to testify?

Mr. MCCOLLUM. That is correct.

Mr. SCOTT. Were they given appropriate notice?

Mr. MCCOLLUM. They were given a week and a half notice, according to what I understand.

Mr. SCOTT. Did they indicate that they didn't want to testify or didn't have time to prepare testimony?

Mr. MCCOLLUM. The staff indicates that it was a time question.

Mr. SCOTT. I wouldn't want the record to reflect that they had declined if that is not what they did.

Mr. MCCOLLUM. Well, I think they did decline, whatever the reason. But nonetheless, your point is made. Apparently they had some time problems and could not or didn't feel they could testify.

Mr. SCOTT. Thank you, Mr. Chairman. This hearing involves an important subject, the effectiveness of our courts in getting restitution to crime victims. The GAO report that we are considering provides information that may prove useful in that inquiry. However,

at this point it appears to do a better job of raising questions than answering them. The report documents variances among the 94 judicial districts in their rates of ordering fines and restitution. I am not surprised that such a variance exists. Fines are discretionary and are based in part on ability to pay. Restitution, while required in most cases pursuant to the Mandatory Victim Restitution Act of 1996, is not required in cases where there is no identifiable victim or loss. There are, of course, differences in types and numbers of cases as well as differences in demographic factors among the districts.

The report admits these factors exist and that they impact the rates of ordering fines and restitution. The report also admits that there may be many reasons for not ordering restitution in individual cases, such as the stolen money having been recovered or restitution having been paid prior to sentencing or that the case involved an attempt or conspiracy. And there is no indication as to what the proper rate of ordering fines or restitution or as to what the proper variance of such a rate should be.

Yet the report suggests that the variance is so great that these and other factors do not explain the extent of the variance among the districts. One question squarely raised by the report is whether the MVRA hindered or helped the cause of restitution given the overall rate of ordering restitution actually dropped more than 50 percent after the act. This drop may suggest that while it is appealing from a political perspective to require that restitution be ordered in every case, in many instances it is a shallow gesture. Given that the earlier report assessed restitution collection effectiveness among the courts, the lower rates of ordering restitution may be a recognition by the courts that an offender ordered to pay restitution or a fine that he or she cannot come close to paying, will more likely pay nothing at all; or if the offender is ordered to pay an amount that he or she can pay, it is more likely that at least some portion will be paid.

With regard to fines, this phenomenon is important because that money goes to the Crime Victims Fund, which pays for critical victim services such as rape counseling and victim assistance programs.

So, Mr. Chairman, I hope that we would do more than just look at the issue of consistency among districts, but also consider the broader issue of how well the MVRA is serving victims, and I guess another question is what impact the Sentencing Commission has on achieving a reasonable uniformity in sentencing.

So Mr. Chairman, I am looking forward to the testimony with the hope that it will help us understand what we might do to assure higher rates and amounts of restitution to victims of crime and some reasonable uniformity amongst the districts.

Mr. MCCOLLUM. Thank you, Mr. Scott.

Mr. Smith, do you desire any opening comments?

Mr. SMITH. I do not.

Mr. MCCOLLUM. Thank you. I want to welcome our first and only witness today, if he would come forward. Our only witness is Richard M. Stana. Mr. Stana is the Associate Director of Administration of Justice Issues for the United States General Accounting Office. He has been with the General Accounting Office since 1976

and has worked on a myriad of domestic and defense issues in GAO's headquarters division, the Detroit office, and in the European office. Mr. Stana has a Bachelor of Business Administration and Economics and a Master of Business Administration and Financial Management from Kent State University.

Accompanying Mr. Stana is Richard Griswold and Jan B. Montgomery. Mr. Griswold is the evaluator in charge of the restitution study which we are considering today, and works in GAO's Los Angeles office. He has been with GAO for 26 years studying various administration of justice issues. Mr. Griswold is a certified public accountant with a degree in accounting from San Diego State University.

Jan Montgomery is the Assistant General Counsel for the Administration of Justice Issues in GAO's Office of General Counsel. She has been working on criminal justice issues for GAO for approximately 10 years. Ms. Montgomery has a Bachelor's Degree in Philosophy from Miami University and a Juris Doctorate from Georgetown University Law Center.

We welcome you today to the Crime Subcommittee hearing. The statements will be admitted into the record without objection, which they are. Mr. Stana, we recognize you to give us your shared thoughts, your statement, any summary you want whatever it may be.

STATEMENT OF RICHARD M. STANA, ASSOCIATE DIRECTOR OF ADMINISTRATION OF JUSTICE ISSUES, UNITED STATES GENERAL ACCOUNTING OFFICE, WASHINGTON, DC

Mr. STANA. Thank you very much, Mr. Chairman. We are pleased to be here today to discuss the results of our report on the differences among Federal courts in ordering offenders to pay fines and restitution. As you know, individuals convicted of a Federal crime can be ordered by the court to pay a fine or restitution at sentencing. Criminal fines, which are punitive, are to be paid in most cases to the Department of Justice's crime victims fund.

Restitution law was reformed by the Mandatory Victim Restitution Act, MVRA, and now requires the court to order full restitution in certain cases to each victim in the full amount of each victim's losses. Unlike fines, restitution is to be paid or ordered regardless of the offender's ability to pay.

For our report you asked us to identify the percentage of offenders who were ordered to pay fines and restitution in fiscal year 1997, identify the differences across judicial circuits and districts in the percentages of offenders ordered to pay fines and restitution, provide officials' opinions about possible reasons for these differences and document the changes in the rate at which offenders were ordered to pay fines and restitution before and after MVRA was passed. In the report we are releasing today we respond to these objectives in detail. I would just like to summarize and make two main points.

First, the judicial district in which the offender is sentenced is a major factor in the likelihood of whether a fine or restitution is ordered. U.S. Sentencing Commission's data base shows that overall, about 19 percent of offenders were ordered to pay fines and about 20 percent of offenders were ordered to pay restitution. How-

ever, our multivariante statistical analysis revealed great variations across the 12 judicial circuits and 94 Federal judicial districts.

Across districts, for example, the percent of offenders who were ordered to pay fines ranged from 1 percent to 84 percent and the percent who were ordered to pay restitution ranged from 3 percent to 49 percent. The likelihood of an offender being ordered to pay fines or restitution could have been three times or more greater in one Federal judicial district than in an adjacent district.

Another major factor was the type of offense committed. For example, our analysis showed that 6 percent of offenders sentenced for immigration offenses were ordered to pay a fine while almost one-third of property offenders were ordered to pay a fine. Similarly, while 1 percent of drug offenders were ordered to pay restitution, almost two-thirds of fraud offenders were ordered to pay.

Besides the type of offenses committed, other factors that were associated with whether an offender was ordered to pay included factors such as gender, race, education, citizenship, length of sentence, and type of sentence imposed—such as prison, probation or some alternative sentence. We controlled for all of these factors for four specific types of offenses, robbery, larceny, fraud, and drug trafficking, and found that the judicial district in which an offender was sentenced continued to be a major factor in whether an offender was ordered to pay a fine or restitution.

For example, offenders convicted of fraud in the Eastern District of Pennsylvania were 13 times more likely to be ordered to pay a fine and three times more likely to be ordered to pay restitution than fraud offenders in the Eastern District of New York. Offenders convicted of fraud offenses in the Middle District of Florida were four times more likely to be ordered to pay restitution than in the Central District of California. Offenders convicted of drug trafficking offenses were 99 times more likely to be ordered to pay a fine in the Western District of Texas than they were in the Southern District of California. Offenders convicted of larceny offenses were 177 times more likely to be ordered to pay a fine in the Middle District of Georgia than in the Southern District of Florida.

Some court officials and prosecutors attributed the differences to the nature and types of offenses committed and the types of offenders sentenced in these districts. Our analysis controlled for many of these factors. Some officials believe that the culture or the management style among the district court officials and prosecutors contributed to the differences. We can discuss more about that later.

My second point is that the effect of MVRA has been mixed, but overall the percent of offenders ordered to pay has declined. Our multivariante statistical analysis showed inconsistencies across the three types of offenses we analyzed. Larceny offenders who were sentenced for crimes committed after MVRA went into affect were about half as likely to be ordered to pay restitution as those sentenced for crimes committed before MVRA went into effect. Robbers who were sentenced for crimes committed after MVRA went into effect were about one-third more likely to be ordered to pay restitution as those sentenced for crimes committed before MVRA went

into effect. Fraud offenders who were sentenced for crimes committed after MVRA went into effect were about 20 percent less likely to be ordered to pay restitution as those sentenced for crimes committed before MVRA went into effect. Although we selected larceny, fraud, and robbery for detailed analysis because of the likelihood of a victim being due restitution, a substantial percentage of all offenders, about one-third to two-thirds of offenders sentenced, were not ordered to pay restitution even if their crimes were committed after MVRA became effective.

In discussing our results, some court officials and prosecutors said that it was still too early to assess the full impact of MVRA. In their written responses to a draft of our report, the Executive Office of the U.S. Attorneys and the United States Sentencing Commission cited training efforts planned for court officials and prosecutors on MVRA, and Department of Justice acknowledged that more remains to be done to increase the number of cases in which restitution is imposed. Court officials and prosecutors offered as possible explanation that stolen money or assets might have been recovered, an offender might have paid restitution prior to sentencing, and the offense might have been attempted fraud or robbery and the offender was arrested prior to obtaining money from the victim, or the offense might have been a telemarketing scheme or some other scheme where there were just too many victims to make restitution orders practical.

In closing, the large statistical variation among judicial districts raises questions on a broad level about whether the goal of uniformity in the imposition of fines and restitution is being met. Our analysis shows that offenders could be much more likely in some jurisdiction than in others to be ordered to pay a fine or restitution for the same type of crime.

This concludes my oral statement. My colleagues and I would be happy to answer any questions you or the other members may have.

[The prepared statement of Mr. Stana follows:]

PREPARED STATEMENT OF RICHARD M. STANA, ASSOCIATE DIRECTOR OF ADMINISTRATION OF JUSTICE ISSUES, UNITED STATES GENERAL ACCOUNTING OFFICE, WASHINGTON, DC

FEDERAL COURTS—DIFFERENCES EXIST IN ORDERING FINES AND RESTITUTION

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the results of our review of the imposition of fines and restitution in federal criminal cases. My statement will outline the results presented in our recently completed report, *Federal Courts: Differences Exist in Ordering Fines and Restitution* (GAO/GGD–99–70, May 6, 1999).

For that report, you asked us to (1) identify the percentages of those offenders who were ordered to pay fines and restitution in fiscal year 1997 and those who were not, (2) identify differences across judicial circuits and districts in the percentages of those offenders who were ordered to pay fines or restitution and those who were not, and (3) provide officials' opinions about possible reasons for these differences. We also documented changes in the rate at which offenders were ordered to pay fines and restitution before and after the Mandatory Victims Restitution Act (MVRA),[1] which was enacted April 24, 1996.

To answer your questions, we used 1997 data from the United States Sentencing Commission (USSC). USSC maintains a computerized data collection system, which forms the basis of its clearinghouse of federal sentencing information. We performed

[1] Title II of Public Law 104–132.

a statistical analysis of this data base for all 12 judicial circuits and 94 districts for offenders ordered to pay fines and restitution. We performed multivariate statistical analyses to determine which factors affected the likelihood of offenders being ordered to pay fines or restitution. We did not determine whether fines or restitution ordered were actually paid. We discussed our results with officials of the Department of Justice (DOJ), the Administrative Offices of the U.S. Courts (AOUSC), USSC, and with chief judges, chief probation officers, and representatives of U.S. Attorneys offices in seven judicial districts. A complete description of our scope and methodology can be found in our report.

Background

Individuals convicted of a federal crime can be ordered by the court to pay a fine or restitution at sentencing. Criminal fines, which are punitive, are to be paid in most cases to DOJ's Crime Victims Fund. USSC Guidelines provide guidance on the minimum and maximum fine amounts to be imposed by the courts, based on the offense. In establishing the USSC, Congress sought, as one objective, uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar criminal offenders. Fines may be waived if the offender establishes that he or she is unable to pay and is not likely to become able to pay a fine. MVRA reformed restitution law and now requires the court to order full restitution in certain cases to each victim in the full amount of each victim's losses, without regard to the offender's economic situation. Previously, as with fines, the court could waive restitution, in most cases, based on offenders' inability to pay.

The Importance of the Judicial Circuit or District in the Likelihood of an Offender's Being Ordered to Pay a Fine or Restitution

While many factors influenced whether an offender was ordered to pay a fine or restitution, the judicial circuit or district where the offender was sentenced was a major factor during fiscal year 1997. This variation among judicial circuits and districts occurred overall for all federal offenders sentenced under USSC Guidelines during that year; and, although occurring less, this variation persisted when we performed multivariate statistical analysis for federal offenders sentenced for four types of offenses.

Most of the approximately 48,000 federal offenders sentenced under USSC Guidelines in fiscal year 1997 were not ordered by the courts to pay a fine or restitution. About 19 percent were only fined by the courts, and about 20 percent were only ordered to pay restitution. Of the offenders sentenced, about 2 percent were ordered to pay both fines and restitution. The total amount of fines and restitution ordered was over $1.6 billion dollars.

The percentage of offenders ordered to pay fines or restitution varied greatly across the 12 federal judicial circuits and 94 federal judicial districts. Across districts, for example, the percentage of offenders ordered to pay fines ranged from 1 percent to 84 percent, and the percentage of offenders ordered to pay restitution ranged from 3 percent to 49 percent. The likelihood of an offender's being ordered to pay fines or restitution could have been three or more times greater in one federal judicial district than in an adjacent district.

An important factor in determining whether an offender was ordered to pay a fine or restitution was the type of offense committed. While 6 percent of offenders sentenced for immigration offenses were ordered to pay a fine, almost one-third of property offenders were ordered to pay fines. Similarly, while 1 percent of drug offenders were ordered to pay restitution, almost two-thirds of fraud offenders were ordered to pay restitution.

Besides the type of offense committed, other factors, based on our statistical analysis, that were associated with whether an offender was ordered to pay included sex, race, education, citizenship, length of sentence, and type of sentence imposed, such as prison, probation, or an alternative.

We controlled for all those factors for four specific types of offenses in our multivariate statistical analysis, and the judicial circuit or district in which the offender was sentenced continued to be a major factor in determining whether an offender was ordered to pay a fine or restitution. For example, offenders convicted of fraud in the Eastern District of Pennsylvania, which includes Philadelphia, were 13 times more likely to be ordered to pay a fine and 3 times more likely to be ordered to pay restitution than fraud offenders in the Eastern District of New York, which includes Brooklyn. Other examples include the following:

- Offenders convicted of fraud offenses in the Middle District of Florida, which includes Orlando, were four times more likely to be ordered to pay restitution than those convicted of the same offense in the Central District of California, which includes Los Angeles.

- Offenders convicted of drug trafficking offenses were 99 times more likely to be ordered to pay a fine in the Western District of Texas, which includes San Antonio, than they were in the Southern District of California, which includes San Diego.
- Offenders convicted of larceny offenses were 177 times more likely to be ordered to pay a fine in the Middle District of Georgia, which includes Macon, than in the Southern District of Florida, which includes Miami.

Some court officials and prosecutors provided explanations of why differences existed among the districts. Some attributed the differences to the nature and type of offenses committed or types of offenders sentenced in the districts. Some officials believed that the culture, or management style, in the judicial district among the prosecutors and court officials contributed to whether offenders were fined or ordered to pay restitution. The culture included how prosecutors and court officials worked together to identify victims and their losses, among other factors.

The Effect of Mandatory Restitution Has Been Mixed, but Overall the Percentage of Offenders Ordered to Pay Has Declined

Although the imposition of restitution for certain offenses became mandatory with the passage of MVRA, the percentage of offenders, overall, ordered to pay restitution during fiscal year 1997 actually declined to 12 percent for those who were covered by MVRA's provisions, down from 26 percent for those who were not. During fiscal year 1997, about 45 percent of offenders sentenced under USSC Guidelines were subject to MVRA's provisions, and 55 percent were not.

MVRA's amendments are to be, to the extent constitutionally permissible, effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment, which was April 24, 1996. However, because of an ex post facto issue, DOJ has issued guidelines that any provisions of MVRA for determining whether to impose restitution or the amount of restitution would be applied only prospectively to offenses committed on or after April 24, 1996. In general, the ex post facto clause of the U.S. Constitution has been interpreted to prohibit the application of a law that increases the primary penalty for conduct after its commission. For our analysis, we used DOJ's guidelines in determining whether an offender was or was not subject to MVRA's provisions.

While the overall percentage of offenders ordered to pay restitution declined, our multivariate statistical analysis showed the following inconsistent results across the three types of offenses we analyzed:

- The likelihood of an offender's being ordered to pay restitution for a larceny offense decreased by almost half;
- The likelihood of an offender's being ordered to pay restitution for a robbery offense increased by almost half; and
- The likelihood of an offender's being ordered to pay restitution for a fraud offense decreased slightly.

In discussing our results, some court officials and prosecutors said that it was still too early to assess the full impact of MVRA. Some officials commented that time was needed to become familiar with and implement MVRA, especially on the part of the Assistant U.S. Attorneys who prosecute cases covered by MVRA. Prosecutors in one district acknowledged that they were not yet fully implementing the law. In their written responses to a draft of our report, both the Executive Office of the U.S. Attorneys and USSC cited training efforts planned for court officials and prosecutors on MVRA. DOJ, in their comments, acknowledged that, while a number of steps have been taken, more remains to be done to increase the number of cases in which restitution is imposed.

Although we selected larceny, fraud, and robbery because of the likelihood of a victim's being due restitution, a substantial percentage of offenders—about one-third to two-thirds of offenders sentenced—were still not ordered to pay restitution, even when their crimes were committed after MVRA became effective. Court officials and prosecutors provided some reasons why restitution might not have been ordered in these cases. In some cases, stolen money or assets might have been recovered. In other cases, an offender might have paid the restitution prior to sentencing, removing the need for a restitution order. Another reason cited by officials was that the offense might have been an attempted fraud or attempted robbery for which the offender was arrested prior to obtaining money from the victim. Some officials also cited an exception to MVRA in ordering mandatory restitution, such as in cases where the number of victims is so large that it makes paying restitution impracticable. One district had a number of telemarketing schemes in which large numbers

of victims were defrauded of small amounts. It was not practical to identify all victims and obtain restitution for them.

Conclusions

Although offender characteristics, type of offense, and the nature of the sentence played a role, the judicial circuit or district where an offender was sentenced was a major factor in determining the likelihood of an offender's being ordered to pay a fine or restitution during fiscal year 1997. This variation among judicial circuits and districts occurred overall for all federal offenders sentenced under sentencing guidelines during that year; and, although occurring less, this variation persisted when we performed multivariate statistical analyses for federal offenders sentenced under sentencing guidelines for four types of offenses. The large statistical variation among circuits and districts raises a question, on a broad level, about whether the goal of uniformity in the imposition of fines and restitution is being met. Under current conditions, offenders could be much more likely in some jurisdictions than in others to be ordered to pay a fine or restitution for the same type of crime.

Although MVRA was intended to eliminate much of the discretion judges previously had in waiving restitution for certain types of crime, the overall percentages of offenders ordered to pay restitution has declined. Of the three offenses we analyzed, the percentages of robbery offenders ordered to pay restitution increased, while the percentages of larceny and fraud offenders decreased. However, there may be mitigating circumstances, such as recovery of stolen money that help explain why restitution was not ordered in a particular case.

This concludes my prepared statement, Mr. Chairman. I would be pleased to answer any questions you or other Members of the Subcommittee may have.

[Note: The completed report accompanying Mr. Stana's prepared statement, *Federal Courts: Differences Exist in Ordering Fines and Restitution* (GAO/GGD–99–70, May 6, 1999) is in the files of the House Judiciary Committee's Subcommittee on Crime. Or visit *http://www.gao.gov*]

Mr. MCCOLLUM. Thank you very much, Mr. Stana, for telling us that. I have several questions that I do want to have answered this morning, if I could, and I know we have a little time. This is a very good report. The Judicial Conference, as you said, reviewed this and they have been somewhat critical of the methodology in the report. They have stated that since it is based on only 1 year's worth of sentencing that it cannot be really reflective of the true actual conditions out there.

Is that something that you find a good argument, a plausible argument? Would it be preferable if you had studied 5 years' worth of these things or what?

Mr. STANA. With your permission, I would like to bring our chief statistician on the assignment up to the table to answer. This is the first time we have seen their critique and I think it is something that maybe we ought to discuss in more detail. We looked at the Sentencing Commission's 1995 and 1996 data base in addition to the 1997 data bank. Our report contains only the 1997 data base. I would like to divide the argument into two parts. With respect to fines, we saw the same variations in the 1995 and 1996 data base that we are reporting to you today on the 1997 data base. So in that respect we do have more than 1 year's data. The trends are there. While more research is always helpful, I think that our findings are valid.

With respect to MVRA, however, the 1997 data were the only data available. The 1998 data are still not available. So we believe that the 1997 data are instructive on what went on with MVRA following its enactment.

Mr. MCCOLLUM. What about their criticism that you relied solely on Sentencing Commission data bases and that an independent review of the cases, which you have said would be too onerous, would

be the only way, in the Judicial Conference's view, that you could determine whether or not there really were valid reasons for variations.

Mr. STANA. I think doing a case-by-case analysis would always be educational and instructive. That is always true. The types of variations that we have seen across judicial districts, however, certainly could not be answered by a preponderance of, say, inability to pay cases being in one district or another. We saw districts that were next to each other where we had great variations. We had districts that had substantial statistical cell sizes for certain crimes that were in similar districts, such as the Eastern Pennsylvania and Eastern New York, where there were vast differences that really could not be explained by one universe having a preponderance of one type of case or offender than the other.

So to some degree, I think their point is valid. As I said, additional research of that variety would always be instructive. I don't think that it explains the variation.

Mr. MCCOLLUM. They also complain that you focused only on the number of cases in which fines or restitution were imposed rather than the amount that was imposed on the given case, therefore it is impossible to determine from the report whether the total amount of restitution imposed has increased under the MVRA. Is that a valid criticism?

Mr. STANA. We did not look at the amount of restitution ordered. I think if we were to do that we would have to also go into the case with a little more detail than was reflected in their critique to determine whether the full amount was actually identified and ordered, not just the amount ordered. We were trying to see how MVRA was being implemented in the types of cases where one would think it should have been ordered, not the amount being ordered.

Mr. MCCOLLUM. That is fair. Can you tell us which of the 12 Federal circuits are among the lowest in ordering the payment of criminal fines and restitution and which are among the highest?

Mr. STANA. The report, I believe on page 11, figure 2, shows by circuit the percentage of offenders ordered to pay fines. You can see from this figure that the D.C. Circuit is the lowest. The two highest circuits would be the seventh and the third. You can see the variation on the chart. It almost looks like a suspension bridge if you connected the dots.

Mr. MCCOLLUM. I can see that there. So that is by circuit. If we needed to, we could dig in and find it by district, I gather?

Mr. STANA. Let me you through our analysis of fraud offenses. I don't know if you are restricted by time. Let's go to Table 1.7, and if I might, I would have Wendy Ahmed, our statistician, explain the analysis.

Mr. SCOTT. Do you have a page number?

Mr. STANA. Yes, page 42. Sometimes when you have a statistical report like this, your eyes can glaze over. But these statistics really are easy to understand once you have someone guiding you through them.

Mr. MCCOLLUM. If you would, please, Wendy.

Ms. AHMED. Table 1.7 on page 42. What we have here is a model of the likelihood of fraud offenders being ordered to pay fines or

restitution. What we see here is, for example, in Pennsylvania East, offenders have 18 times the likelihood of being ordered to pay fines than in South Carolina. Along those same lines, in Pennsylvania East fraud offenders are six times as likely to be paying fines than in Florida South.

So these numbers are the odds ratios, which means that it is the difference between the two districts ordering restitution or fines compared to not ordering restitutions or fines.

Mr. STANA. You could see how the math would be done. For example, in Pennsylvania East, the factor shown under model 2 is 18. We could use Florida Middle as an example. That is your district.

Mr. MCCOLLUM. That is true.

Mr. STANA. If you divided 2.37 into 18, you find that you are nine times more likely in Pennsylvania East to be ordered to pay a fine than you would be in Florida Middle. You can do the math all the way down the line that way.

Mr. MCCOLLUM. Is this based as well on numbers of cases? For example, maybe there was only one fraud case in the Middle District of Florida and there were 10 of them in Pennsylvania or vice verse? Is that a factor at all?

Ms. AHMED. In Florida Middle, there are 228 fraud cases sentenced in 1997. There are 225 in Pennsylvania East.

Mr. MCCOLLUM. So it is a real good comparison in that regard.

Ms. AHMED. These are.

Mr. STANA. In picking the four crimes that we did, and Rich Griswold could explain this in more detail, we tried to confine our analyses to crimes where there were many offense categories, many offense occurrences in each statistical cell. This is why we did not analyze mail fraud or another crime where there weren't as many offenders. But there were large numbers of offenders in the four categories we studied in each of the 94 judicial districts.

Mr. MCCOLLUM. Okay, good. I will yield to Mr. Scott. I have taken my 5 minutes and we will come back if we want to ask more. Please, Mr. Scott.

Mr. SCOTT. Thank you. Mr. Stana, you indicated that you did not look into the amounts, you just looked at the amounts ordered? Whether there was an order or not, the amount ordered?

Mr. STANA. Yes.

Mr. SCOTT. You did not look into whether or not anything had been paid?

Mr. STANA. No, although that would be an interesting study. If you would like some more information on that, we could study the collection of fines and restitution and report our results at another time.

Mr. SCOTT. Because if two judges, one ordered the fine and the other one didn't and the guy that was ordered a fine or restitution never paid, that would end up being the same thing; but on your report the judge would at least get credit for having made the order?

Mr. STANA. We didn't check whether the payment was madem, but that would be an interesting analysis.

Mr. SCOTT. Did you look at the likelihood of whether or not incarceration had been ordered, that is if someone had been sent to jail?

Mr. STANA. Yes, we did. We controlled for that factor among others. Let's go back to Table 1.7 on page 42. The difference between the model 1 and model 2 columns is that model 1 is a raw number that doesn't take into account those factors or the pull of those factors on a sentencing decision. Model 2 does. If you look further down the table where it says offender characteristics, it shows the effect of these different variables on whether a fine or restitution was ordered. Wendy, do you want to explain these?

Ms. AHMED. As Mr. Stana said, we controlled for all of these other characteristics. For example, if you were sentenced to prison for a fraud offense, you could see that you are 70 percent less likely to pay a fine——

Mr. SCOTT. Where is the 70 percent?

Ms. AHMED If you look at prison versus probation, under sentence characteristics, on page 43 at the second half of the table.

Mr. SCOTT. That is the last number, the 7.71?

Ms. AHMED. It is a .35 under model 2, under fines, across from prison versus probation.

Mr. STANA. Right under the bold title that says sentence characteristics.

Ms. AHMED. You are only .35 times as likely to be ordered to pay a fine if you are sentenced to prison over probation. An important thing to understand here is that these other factors do have some effect on the ordering of fines and restitution, though they aren't explaining away the bigger differences that we see across districts, and also across circuits in some of the other tables, for the various crime types.

Mr. SCOTT. You are I guess one-third as likely to have a fine imposed if you are sent to prison in those districts where they are sending more people to prison; you would expect one-third as much fines to be given.

Mr. STANA. Another way to look at that, Mr. Scott, is to look at the difference between the outcomes of model 1 and model 2. You see that the likelihood of being ordered to pay a fine or restitution does change when you consider all of these factors. Let's go to the bottom of page 42 again. For example, if you look under model 1, which does not consider things like sentencing characteristics and different demographic characteristics, in Pennsylvania East, you are five times more likely than in South Carolina to receive a fine for a fraud offense. Once you consider all of these other factors, you become 18 times more likely to be sentenced to a fine with a fraud offense, as shown in the model 2 column. So the criticism that the analysis does not take into consideration these factors isn't valid, although we are not disputing the fact that a case-by-case analysis might other information. When we controlled for all of these factors statistically, the variances that we found among judicial districts certainly did not go away. In some cases they were exacerbated.

Mr. SCOTT. Whether or not a specific victim had been identified, how did that fit into the chart?

Mr. STANA. I am sorry.

Mr. SCOTT. Whether or not an identifiable victim, whether or not there was an identifiable victim and whether or not there was, in fact, a loss that was not—for example, I think one of the criticisms was that it was armed robbery and they caught you on the way out

the door and they got the money back. You are not going to have restitution in that case.

Mr. STANA. We believe those kinds of situations tended to even out across districts, based on discussions with court officials about the caseloads. But what also emerged from these discussions was the importance of the culture of the district.

Rich, would you please explain what the officials told you about the cultures and what some of the people that you interviewed said the differences were between, say, a New York district where they once worked and the northern California district where they now work?

Mr. GRISWOLD. I just want to comment briefly on the concern that we had there was just one year of information on fines and restitution ordered. We also had the Sentencing Commission data. The Sentencing Commission prints a book every year that has aggregate statistics that show variation by districts in fines and restitution ordered. Thus, we had several years showing variation by district for fines and restitution combined. But as Rich said, we were presented with all of these factors why these variations might exist. So we wanted to do a much more sophisticated analysis. We controlled for all of these factors in our analysis and we still could not explain away the variations. In other words, the variations that persisted over the years continued when we did the more sophisticated analysis.

So we felt that we had to also go out and talk to court officials and prosecutors to find out why these variations existed. We asked them if they could provide us with some insights. We went to the Northern District of California, where there were prosecutors who had transferred from the Eastern District of New York. They commented on how different the culture was in the U.S. Attorney's office in San Francisco than it had been in Brooklyn. They said in San Francisco they mixed the civil and criminal attorneys together, whereas in the Eastern District of New York they were kept separate. In San Francisco the civil attorneys, who were focused very much on identifying monetary losses, aided the criminal prosecutors in identifying individuals and circumstances where there might be a victim and losses. They said there was more of an emphasis on making sure you identified the victim and making sure you identified the loss.

Another brief analysis on culture was actually done for us by two chief probation officers, one in the Northern District of California and one in the Central District of California. What the chief probation officer found when he looked at bank robbery, which is a subset of our armed robbery statistic, was that in the Northern District of California restitution was being ordered in every case if there was a loss identified by the probation officer in a presentence report. But in the Central District of California the chief probation officer found that even if the probation officer had recommended that restitution should be ordered in a pre-sentencing report to the judge, the recommendation was not always being followed by the judge at sentencing. So in one district, the judges always followed the probation officer's recommendations on restitution and in another district they did not.

Those were some of the cultural differences that were brought up to us as we went around and talked to the different judges, prosecutors and probation officers.

Mr. SCOTT. Mr. Chairman, I had another question.

Mr. STANA. Mr. Scott, could I answer one other question? You asked us before whether we identified the victim losses in our study. I was just reminded that we tried to use the loss data in the U.S. Sentencing Commission data base to do that. The Sentencing Commission individuals who were responsible for maintaining the data base told us that the data weren't very reliable, that in some cases the data were missing or they just weren't entered into the system. So we did not calculate it because it would have given us a figure that was highly suspect.

Mr. SCOTT. When a judge sentences a defendant, you have got fines, costs, restitution, and incarceration. All of that is in the sentencing order?

Mr. STANA. Yes.

Mr. SCOTT. If they vary from the sentencing guidelines, they have to have a finding that they are varying from the sentencing guidelines; is that right?

Ms. MONTGOMERY. With regard to restitution, it does not have to be ordered if there is no identifiable victim. That is not going outside of the guidelines.

Mr. SCOTT. Well, if we are talking about sentencing, if you assume that they are complying with the sentencing guidelines, then they ought to be having uniform sentencing. If they are not complying, we ought to ask the Sentencing Commission why not.

Mr. STANA. That would be an interesting question.

Ms. MONTGOMERY. Under the statute and the guidelines, the inability to pay is a reason to not impose a fine.

Mr. SCOTT. The ability to pay is how much the fine should be.

Ms. MONTGOMERY. You can also just waive the imposition of a fine if the defendant establishes that they have no ability to pay.

Mr. STANA. That is another factor that was raised in the critique offered by the AO, that the ability to pay should have somehow entered into our analysis. There is no good ability to pay information in the USSC data base. We did attempt to triangulate it by looking at education level, size of family, and other factors. We derived a rough approximation of ability to pay that way. But again, when we controlled for that, we just didn't find that it accounted for the variation among districts. It just didn't statistically matter that much.

Mr. SCOTT. But if we are going to do anything about it, it seems to me that the Sentencing Commission would be where we would want to look rather than the statutory language; is that right?

Mr. STANA. I think there are a couple of things that could be done. One, the Department of Justice and the AO have mentioned educational initiatives that they have under way to inform the interested parties about the MVRA and what needs to be done. That certainly would be useful. As Rich Griswold pointed out, we saw differences in practices across different districts. In some districts, from the judge down to the working level, the expectation was that victims' losses would be identified and where they could identify a victim and a loss, it was expected that a restitution order would

be made. They would make a serious effort to do those things. In other districts we found that they resigned themselves that the victim's losses will never be identified, will never be collected, and that it was better to move on. So they didn't order restitution as often as the others.

Mr. SCOTT. Were you able to determine whether or not there was a difference—I understand there was a gradual implementation of the MVRA, that they had had education in some circuits and hadn't gotten around to it in others. Were you able to discern any difference after the educational process had been finished?

Mr. STANA. No. We took the data that were available for fiscal year 1997.

Mr. SCOTT. Do you have any—do you want to comment on why the orders of fines and restitution went down after the MVRA passed?

Mr. STANA. It is counterintuitive. It is puzzling. To some extent it might be accounted for by the type of caseload that existed after MVRA went into effect compared to before MVRA. For example, there might have been more immigration cases or drug cases where restitution is less likely in the post-MVRA caseload. But even when we tried to control for that possibility, the post-MVRA results didn't bring to the level we saw in the pre-MVRA period. It is puzzling. You would have thought that it would have made a difference, but it didn't appear to make the difference that was anticipated.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. MCCOLLUM. I have some more questions. Mr. Canady, do you want to ask yours first?

Mr. CANADY. No.

Mr. MCCOLLUM. First of all, in examining the data, there are some examples, of course, you have given us already of some big differences here in the ordering of fines and restitution between the districts. One I am curious about is there is only 1 percent of all drug offenders were required to pay fines in the Southern District of California, but 22 percent were required to do so in the Southern District of Texas. Do you have any explanation of why that is the case on that particular one? Is that one that you can refer to and find in your tables there?

Mr. GRISWOLD. That is something that totally puzzles me.

Mr. MCCOLLUM. No good reason for that?

Mr. GRISWOLD. I can't think of any good reason.

Mr. MCCOLLUM. It looks like twice as many offenders in Dallas are ordered to pay restitution in robbery cases than in Los Angeles. That is just an interesting statistic. That doesn't make sense. You would think that Dallas and Los Angeles would be comparable in that but they are not. No good explanation for any of that?

Mr. STANA. No. As I said, we controlled for all of the variables we felt we could control for statistically, and this situation exists.

Mr. MCCOLLUM. You refer to the culture problems there. Can anybody elaborate, Mr. Griswold or otherwise, on the U.S. attorneys being a part of the problem? Because Judge Kazen refers to that in his Judicial Conference report. He is kind of saying that this is a U.S. attorney problem principally. Is that the culture prob-

lem that we are talking about or is there more to it than what Judge Kazen seems to be implying?

Mr. GRISWOLD. I think it relates to the culture. The office culture is something that you have to pick up when you walk into an office and you talk to people. You try and find out how they operate. The best insight I got was where prosecutors had transferred between offices and they could see the difference in the cultures of the two offices. That includes, as the judge is pointing out, what the offender is charged with. You must sure you identify the victim, and make sure you identify the loss during the plea agreement. Because most cases are handled by plea agreement and are not going to go to trial, somebody has to speak up for the victim when that plea agreement is put together.

In the Northern District of California the prosecutors felt that there was just more of an emphasis to make sure that that victim and the losses were identified and put into that plea agreement than there was in the district from which he had come.

Mr. MCCOLLUM. So in other words, since such a large number of these cases involved plea agreements that involved recommendations of the U.S. Attorney to judges, those variations in the recommendations could account for—the plea agreements could account for a good deal of this disparity. Is that a fair assumption?

Mr. GRISWOLD. I think Judge Kazen makes a good point there.

Mr. STANA. Just to amplify, it is not only the judge who is responsible here. It is true that some judges in one district were given the recommendation to make a restitution order but declined. But I think it is also an issue for the working level staff, which I think is what you are getting at. It is how the U.S. attorneys work with the probation office, and how everyone works together with an attitude and an expectation that they are going to identify victims and their losses. If you have an attitude of resignation, of, gee, we are just not going to be able to do this, it is too hard, they are never going to pay it, what is the use, then you just won't see the numbers of restitution orders.

Mr. MCCOLLUM. Are there any statistics or any information in the data base in what you have done that would reflect the differences in districts based upon some of them having, say, a fraud area, many more cases that the judge actually went through trial on as opposed to the plea bargain, or is the plea bargain just roughly comparable to the same number of cases in every district across the country, so there is not a variable that is of any significance?

Mr. STANA. We didn't see a variable like that to add into our analysis.

Mr. MCCOLLUM. One other question that I had was in your testimony—I don't think this was asked—you state that only 2 percent of all offenders are being ordered to pay both a fine and a restitution. I am curious not only why the numbers are so low, but also aren't the purposes of the fine and restitution different? It would strike me that there ought to be some real differences here between a fine and restitution. I don't know whether there are distinctions, whether your report and study shows and reflects this and what it reflects, whether or not there is any more emphasis now on restitution than on a fine; if somebody can afford to pay only so much,

are the judges, are the courts, are the U.S. attorneys, and the probation officers recommending restitution over a fine, first, and, therefore, in cases of ability to pay there are lower fines and higher restitution? I am just curious about that variable and also why the 2 percent, why both is so low. Maybe that is the reason. I just don't know.

Mr. STANA. We attempted to control, I believe, for the type of sentence, the sentence characteristic, correct?

Ms. AHMED. Yes. We controlled for prison over probation, and then any kind of alternative sentence being imposed as well as the length of the sentence.

Mr. STANA. Are you are asking if one were sentenced to pay a fine, then one wouldn't be sentenced to restitution or vice versa, because they are mutually exclusive? That is not so. If you look under alternative sentencing, page 43 at the top of the table, that is where we would show whether a fine was ordered in the restitution case. You can see it did have an impact but, again, it wouldn't explain the variation. The 2 percent ordered to pay both a fine and restitution is included in the 19 ordered to pay a fine and the 20 percent ordered to pay restitution—it is not additional to those two. As to why that percentage is so low, aside from the statistics we are citing, it is difficult to say.

Ms. MONTGOMERY. One point is, technically, under the law, restitution takes priority over fines. So in terms of imposition of fines, you have to take into account if it would get in the way of paying restitution.

Mr. MCCOLLUM. You follow up. Go ahead.

Mr. SCOTT. I think what you just said is that restitution comes first?

Ms. MONTGOMERY. Right.

Mr. SCOTT. So you are not getting in the way of restitution in terms of whatever you have got goes first to restitution. So imposing a fine would not get in the way of a victim being compensated?

Ms. MONTGOMERY. Right. As Rich Stana said, they are not mutually exclusive. You can certainly be ordered to pay both. But under the law, if there is a limited amount of money the restitution would have priority.

Mr. STANA. There is no ability to pay determination for restitution as there is for fines.

Mr. MCCOLLUM. I am disturbed that the report shows that less than half of the fraud offenders are being ordered to pay restitution in the Central District of California—of course, that is Los Angeles—and the Eastern District of New York, Brooklyn. And in Manhattan the percentage is just 51 percent. That is really low for fraud, it seems to me, of that particular crime. Is there any explanation? Is these particular districts ones that you actually looked at or talked to somebody in? Do we know?

Mr. GRISWOLD. We did talk to people in those districts. Fraud is a percentage that really puzzles me because on the previous work that I did, I looked at about 500 cases. Whereas in robbery you might recover the money, in fraud I didn't see many cases where you would get the money back. It was missing by the time the person was apprehended. I don't know why the fraud numbers are so low in these cases. It may be accounted for in some cases by at-

tempted fraud, things where they caught the people in advance. Still, I don't think that is half the cases. I don't know why it is so low.

Mr. MCCOLLUM. One of the questions that you might have gotten in the field discussions that I am curious about too is you are probably aware that U.S. attorneys are required to have victim witness coordinators. I don't know if these individuals are dropping the ball or not. Are you familiar with the fact that they have such a person, such an entity within the U.S. Attorney's offices, so-called witness victim coordinators?

Mr. GRISWOLD. I am familiar with them. We usually talk to someone in the Criminal Division and the victim witness coordinator was usually not—well, I don't remember every——

Mr. MCCOLLUM. It is just something that we need to pursue because this is the type of individual that I envision, whether it is true or not, who would be involved or should be involved in the U.S. Attorney's office in trying to make some of the restitution happen inside the shop. Maybe that is a failure, too. But we have no information that you have on that.

Any other questions anybody wants to ask? Mr. Scott, Mr. Canady.

Mr. SCOTT. Just a follow-up on the fraud. Does insurance make a difference, whether or not the fraud may have been covered by insurance?

Mr. GRISWOLD. Then the insurance company would become the victim.

Mr. SCOTT. And that the judge might be less concerned about the insurance company than he would some hapless individual?

Mr. GRISWOLD. I don't think under restitution you are allowed to make that distinction. If there is an identifiable victim, the judge should order restitution.

Mr. SCOTT. The judge should. But you wouldn't have noticed—that wouldn't have been part of data that you would have been looking at?

Mr. STANA. No. If there is an identifiable victim, as Rich Griswald pointed out, there should be a restitution order. I don't know that we would have any information to say whether it would make a difference whether it was an individual or a corporation who was the victim.

Mr. SCOTT. Thank you.

Mr. MCCOLLUM. Anything, Mr. Canady, that you wish to ask?

Mr. CANADY. No.

Mr. MCCOLLUM. I want to make an observation in closing, and that is that first of all, you did a very fine job. I know that there are always things you could do more and that is what the Judicial Conference analogy is pointing out, there is no way for this to be complete. But the point is that you have demonstrated, I think, to everybody's satisfaction on this committee that there is a problem here of sizable proportions. There is something wrong with this much disparity. This is something the Judicial Conference really needs to look into. It is something that the Justice Department needs to look into and the U.S. Attorney's offices and with probation officers. We are not going to get to the bottom of that today, but it is a road map.

For example, if you look at your table on page 33 starting there, of all of the districts on finding restitution and just glance at those sheets, the disparity—I know that you pointed out two or three, but the disparity is just all over the board. While we wouldn't expect it to be absolutely uniform and surely there are plenty of reasons why in a given case you would have a variable that would make it exaggerated perhaps; to have this much as you pointed out does not make for good justice. It is not fair. There is something wrong here, especially if the victim's restitution provisions that we passed. The mandatory provisions are not resulting in a greater emphasis on restitution. Then either the coordinators aren't doing their jobs that we think they are in the U.S. Attorney's office or there is a failure as you pointed out in the system, the operation between the probation officers and the U.S. Attorneys or the plea bargaining is in the way.

I don't know what the answer is, and I know that you don't either. But it does give us a lot of material with which to inquire and further do our job of oversight on the court system in the area of our juvenile—not juvenile, but our criminal justice system. So we want to thank you for this.

Mr. Scott.

Mr. SCOTT. Mr. Chairman, one of the groups you left out in your list of people that we might want to hear from is the Sentencing Commission.

Mr. MCCOLLUM. Absolutely. I agree. You pointed it out earlier. They have a role to play in this, too, because I am sure they are concerned of the outcomes, that their guidelines are not necessarily getting the results that perhaps they would want either. I don't know whether they are. Did anybody here interview the Sentencing Commissioners in any way? Was that part of your report?

Mr. STANA. We spoke extensively with their data base managers and talked about the dimensions of the system and what you can say with it and what you can't say with it, which variables were reliable and which ones weren't. As far as talking to the commission staff, we did not, right?

Mr. GRISWOLD. We talked to some of the staff.

Mr. MCCOLLUM. The only reason that I ask that is as a predicate to, obviously, our need to get with the Sentencing Commissioners and the staff and determine what their perspective is on this and what their take is on it. They should be very concerned about this and share that concern since this is a variable that is too great for normalcy.

Mr. Gekas, we were just about to conclude this hearing. What this is about, as you may be aware, is the General Accounting Office, they have just given us a report that is rather startling, which demonstrates an extraordinary variation on fines and restitution throughout the districts and the circuits in the country in four major crime areas in the study they have done. It is almost incomprehensible how this could be. The fact of the matter is that restitution actually is down in the Federal system in the year or so since the Mandatory Victim Restitution Act has been law rather than up when our intent was to get it up. If you have any questions or wish to inquire, you are certainly welcome.

Mr. GEKAS. No, but your comments lead me to comment on the fact that when we instituted sentencing guidelines several years back, we did so partially on the hope that disparity in sentencing would be reduced nationwide. That would carry with it, you would think, a reduction of disparity of fines, restitution, and other sanctions. And what you are saying to me—I have not read this yet—leads us to be puzzled about that.

Mr. MCCOLLUM. That disparity is as wide or wider than ever, it looks like, and it is extraordinary. So we have a lot more to do but you have the given us the blueprint and that is all we could ask for. We thank you, all four of you, for coming out today.

Mr. STANA. Thank you, Mr. Chairman.

Mr. MCCOLLUM. The hearing is adjourned.

[Whereupon, at 10:27 a.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF GEORGE P. KAZEN, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Mr. Chairman and Members of the Committee, I am George P. Kazen, Chief Judge of the United States District Court for the Sou them District of Texas. I am providing this written testimony to you today in my capacity as Chairman of the Committee on Criminal Law of the Judicial Conference of the United States. On behalf of the Judicial Conference, I appreciate the invitation to testify.

As you requested, I will discuss the recent report of the General Accounting Office ("GAO") entitled *Federal Courts: Differences Exist in Ordering Fines and Restitution* (the "Report"). We have reviewed a draft copy of the Report provided to us by the GAO. For reasons that I will describe, we believe that the Report is of limited value due to the short time period studied, the necessarily small database of cases upon which it was based, and the methodology employed in carrying it out. We also believe that the Report's usefulness is limited because the study on which it is based was conducted prematurely. Nevertheless, I will describe the efforts being undertaken by the judicial branch to implement the Mandatory Victim Restitution Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended in-scattered sections of 18 U.S.C.) ("MVRA") toward the goal that fines and restitution be equitably imposed nationwide. This goal is important to us. As you know, the members of the federal judiciary share your profound concern for the victims of crime, and the judicial branch has diligently taken steps to enhance our efforts in this area, particularly with regard to victim restitution.

Although the Report suggests in its title that differences exist in ordering fines and restitution across judicial circuits and within circuits, the Report falls short in articulating the reasons for the differences other than noting that it may be too early to see the full impact of the MVRA and that there may be mitigating circumstances which explain why restitution was not always ordered.

As the GAO itself apparently recognizes, absent a lengthy analysis of many cases from every district in the country, it would be impossible to have a credible explanation for why fines and restitution orders would vary widely from one district to the next. A good deal of variation may be entirely appropriate, especially since in cases involving offenses not covered by the MVRA, the imposition and amount of restitution is left to the sound judgment of the court, based upon the facts and circumstances of the individual case. We simply do not know if such variation is appropriate, given the information available to us now. However, we firmly believe that one should refrain from making hasty policy decisions or far-reaching conclusions based upon this Report because of problems with its approach.

It is our understanding that, in preparing this Report, the GAO relied upon data from the United States Sentencing Commission's ("Sentencing Commission") database for fiscal year 1997 (data representing guideline sentencing during the period between October 1, 1996 and September 30, 1997) to identify the percentage of offenders who were or were not ordered to pay fines and restitution, and to document changes in the rate at which offenders were ordered to pay restitution before and after the MVRA. The GAO also attempted to identify percentage differences across judicial circuits and districts in the number of offenders who were or were not ordered to pay fines or restitution. The Report also summarized court officials' opinions about possible reasons for the differences.

In order to determine the percentage of offenders ordered to pay fines, it is our understanding that the GAO analyzed larceny, fraud, and drug trafficking crimes because of the large number of offenders sentenced. Likewise, to determine the percentage of offenders ordered to pay restitution, the GAO analyzed robbery, larceny,

and fraud crimes because there were a large number of offenders sentenced, and these crimes typically result in identifiable victims.

The Report's conclusions are of limited value due to the limited time period studied, the resulting constrained database generated, and methodologies employed in its analysis.

One of the most significant problems with the Report stems from the fact that it is based upon only one year's data. The GAO relied only upon data from the Sentencing Commission's database for fiscal year 1997. One year is a very narrow window through which to examine this area. In view of all of the variables considered by the GAO, compared to the total number of defendants sentenced, the usefulness of the data from this study is, at best, somewhat marginal.

The data studied is too narrow in other respects, as well. The GAO relied solely on the Sentencing Commission database. It did not conduct an independent review of case files, noting that a review of court case files would have been time consuming. Such a study would indeed be time consuming and costly, but it would be the only way to provide a legitimate response to the inquiry. To my knowledge, the only entity within the judicial branch that would have a reasonable ability to perform such a study would be the Sentencing Commission, since it routinely collects from all courts presentence reports and judgments with statements of reasons how the sentences were determined. In any event, the Report does not consider prosecutorial decisions nor district or circuit court decisions, which could cause differences in when and how restitution and fines are ordered. For example, by relying only on Sentencing Commission statistics, it is impossible to ascertain if the courts made findings regarding disputes as to the proper amounts of restitution allowable. Also, in certain complicated telemarketing schemes with large numbers of victims, the courts might have made factual and legal findings that determining restitution would result in the complication and prolongation of the sentencing process to the extent that it outweighed the needs to provide restitution to victims. The GAO conceded that it did not review relevant district and circuit case law in this area, making it impossible to determine whether a particular court imposed, or failed to impose, restitution and fines according to prevailing law during this period. In addition, without an independent review of case files, it is difficult to confirm if stolen money or assets were recovered, if restitution was paid prior to sentencing, or if the offense did not actually result in a financial loss because it was merely an attempted offense or a conspiracy that did not succeed.

The Report's methodology also fails to account for significant factors that could have a substantial effect upon the imposition rate of fines and restitution. For example, the Report fails to take into account prosecutorial charging and plea decisions or varying rates at which specific types of cases occur in particular district and circuit courts. Charging and plea decisions have a critical impact on the losses subject to restitution, since only losses resulting from the offense for which the defendant was actually convicted may be awarded under the current reading of the statute. Moreover, the Report does not consider the impact that a defendant's indigency may have upon imposition of fines and restitution. Specifically, the Report did not take into account how many offenders sentenced under the sentencing guidelines during the period of October 1, 1996 through September 31, 1997 had appointed counsel due to their inability to pay an attorney. According to statistics compiled by the Administrative Office of the U.S. Courts ("Administrative Office"), defendants qualified for court-appointed counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, ("CJA") in almost eight-five percent (85%) of the cases in fiscal year 1997. As such, fines and restitution rates of approximately twenty percent (20%) would indicate that the courts are properly considering the defendant's ability to pay when imposing discretionary restitution or fines, since both must be based upon a defendant's ability to pay. Similarly, it cannot be determined from the data how many defendants were deportable aliens, who appear in ever increasing numbers.

Finally, the Report only focused on numbers of cases in which fines or restitution was imposed, rather than on the amount that was imposed in a given case. Therefore, it is impossible to determine from the Report whether the total amount of restitution imposed has increased under the MVRA. Simply reporting the number of cases in which restitution is imposed will not reflect whether courts were imposing partial restitution pre-MVRA, but full restitution post-MVRA in similar cases. The only way to determine the impact of the MVRA on the amount of restitution being ordered would be to study the facts underlying the cases compared to the dollar amounts of restitution imposed. In fact, according to data published by the Department of Justice, (DOJ) the amount, of restitution imposed since the MVRA has skyrocketed. In fact, DOJ statistics reflect that the criminal debt imposed owing to

third parties in FY 1997 increased by more than $1 billion during FY 1997. U.S. Dept. of Justice, *U.S. Attorneys Annual Statistical Report*, FY 1996 and FY 1997.

The Report's conclusions are of limited value because the study was premature.

As noted in the Report, the MVRA was enacted on April 24,1996. Due to *ex post facto* considerations, most courts have held that a defendant is not subject to the provisions of the MVRA unless the offense occurred after the enactment date. The period studied was a classic transitional period during which the courts were probably dealing with a mix of cases under both old and new restitution law. Moreover, the courts, as well as the U.S. Attorneys offices, were and still are learning about these new restitution provisions and how to properly implement them. In some respects these provisions are somewhat ambiguous. For example, the case law regarding losses subject to restitution under the previous version of the statute is complex and inconsistent. The MVRA introduces new definitions of the term "victim" that will affect the analysis of loss. It will take some time before the law develops sufficiently to yield consistent results.

Indeed, the problem with beginning the study during this transitional period was exacerbated by the GAO's own choice of offenses to analyze. Typically, robbery, larceny, and fraud cases are complex offenses, requiring months, if not years, of investigation before arrests are made. Moreover, under current case processing, once an arrest or an indictment is filed, an additional twelve to eighteen months may pass before sentencing. As a result, the number of defendants subject to the MVRA provisions (and, thus, the impact of the MVRA) within the pool of data examined by the GAO is difficult to quantify. Certainly, more reliable data could be generated by studying the impact of the MVRA once it has been established for a reasonable period of time.

The judicial branch is continuing to take steps to implement the MVRA and enhance the collection of fines and restitution.

The judicial branch has diligently taken steps to implement the MVRA, educating court staff about the need to ensure that restitution orders are fairly and consistently entered and that all appropriate steps are taken to enhance the collection of fines and restitution. Indeed, on May 31, 1996, shortly after the passage of the MVRA, the Administrative Office issued a comprehensive memorandum, followed by several other memoranda, that fully described the implications of the new law, as well as setting forth the criteria for its implementation. These memoranda were the "front line" in preparing our courts and court personnel to meet the demands of the MVRA. Copies of the memoranda are attached. The Report acknowledges that it is still too early to assess the full impact of MVRA, given that time may be needed for a body of case law to be developed and for attorneys and judges to become, familiar with and implement the MVRA.

The federal judiciary has also taken steps in this area in response to an earlier GAO study, entitled *Fines and Restitution: Improvement Needed in How Offenders' Payment Schedules are Determined* (GAO/GGD–98–89; June 29, 1998) ("Collection Report"). The Collection Report recommended that the Administrative Office establish specific guidance, as policy, on how probation officers should determine how offenders should pay their fines and restitution. The Collection Report also recommended that the Administrative Office implement procedures to ensure that probation officers are aware of and recognize the guidance as policy. The Administrative Office and the Committee expressed concerns following its review of the Collection Report and recommended substantial revisions to the GAO in a letter dated April 20, 1998, which is attached. Nevertheless, we agreed that performance could be improved in this area and developed plans to do so.

At its December 1998 meeting, the Judicial Conference Committee on Criminal Law ("Criminal Law Committee"), which I chair, endorsed the development of a monograph on the probation officer's role in fine and restitution collection. The monograph will describe current law in this area, consolidate Administrative Office policy, and encourage close working relationships between the probation officers and the financial litigation units located in U.S. Attorney offices to ensure that court orders are enforced.

In that regard, I must stress that it is the United States Attorney which represents the United States as a litigant in all these cases and, as in any case, it is ultimately the prevailing party's responsibility to collect any judgment awarded to that party. In criminal cases, a court can require a defendant to make good faith efforts to pay a judgment, but that ability only exists while the defendant is still under supervision. When large sums are involved, collection efforts must continue long past the time that supervision has expired. Even during supervision, such collection efforts as garnishment, execution sales, etc., must be initiated by the prevail-

ing party, not by the court. No study of fines and restitutions could be meaningful without considering the policies of the various United States Attorneys offices throughout the country.

In April 1999, the Director of the Administrative Office, Leonidas Ralph Mecham, authorized the establishment of an Ad Hoc Work Group on Fines and Restitution. Eight participants were selected from a pool of more than fifty probation officers who expressed interest in participating in this project. Work group members represented California Central, Kansas, Idaho, Louisiana Middle, Massachusetts, New York Southern, Texas Southern, and Virginia Eastern. Other work group participants included representatives from the Administrative Office's Office of the General Counsel and Federal Corrections and Supervision Division, the Federal Bureau of Prisons, the United States Sentencing Commission, and the Federal Judicial Center, which plans to revise its *Financial Investigation, Desk Reference for U. S. Probation and Pretrial Services Officers* later this year.

The work group met April 28–30, 1999, at the Administrative Office, and a draft outline of the monograph has been produced. Over the next six months, the draft monograph will be provided to members of the Administrative Office's Chief Probation Officers Advisory Groups, Department of Justice officials, and staff at the Executive Office for United States Attorneys for comment. At its December 1999 meeting, the Criminal Law Committee will be presented with a draft monograph for approval.

Training is occurring on other fronts, as well. Staff from the Administrative Office's Office of the General Counsel and the Sentencing Commission have been involved in ongoing in-district training on mandatory restitution since July 1998. A session on restitution was presented to approximately 150 participants (circuit judges, district judges, probation officers, prosecutors and defense attorneys) at the Federal Judicial Center's National Sentencing Policy Institute in March 1999. Later this month, 160 probation officers and 140 prosecutors and defense attorneys will receive training on the MVRA at an annual training event sponsored by the Sentencing Commission and the Federal Bar Association. This summer, all district judges will be invited to receive training on restitution by staff from the Administrative Office's Office of the General Counsel and the Sentencing Commission at three Federal Judicial Center National Workshops for District Judges. A copy of the materials that the participants receive in all of these training programs, entitled *Determining Victims and Harms for Restitution in Federal Criminal Cases*, is attached. Finally, the Federal Judicial Center is planning a two hour broadcast on mandatory restitution on the Federal Judiciary Television Network in late July of this year. As we continue to review our programs, we will seek to further expand efforts in this area, as deemed appropriate.

Ultimately, however, education and training can only do so much in this or any other area. Fundamentally, the decision whether or not a particular defendant is ordered to pay a fine or restitution and, if so, how much, is made like every other sentencing decision or indeed any judicial decision—by each judge on a case-by-case basis. The variables in each case are innumerable. In our adversary system, each side presents its claims or defenses to the court and each side may appeal if dissatisfied with the court's decision. Specifically, the government—which is essentially the plaintiff in all criminal cases—has the right to appeal any sentencing decision which it deems contrary to law. Results of such appeals by decisions of the circuit courts, and sometimes the Supreme Court, are what create a uniform body of law.

Once again, I would like to thank you for the opportunity to provide testimony on behalf of the federal judiciary. We look forward to working with the Members of this Subcommittee and the Department of Justice on the important issues raised here today.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Washington, DC, April 20, 1998.

Mr. RICHARD STANA, *Associate Director,*
Administration of Justice Issues,
General Accounting Office, Washington, DC.

DEAR MR. STANA: Thank you for the opportunity to comment on the draft General Accounting Office (GAO) report entitled, *Fines and Restitution, Financial Standards Needed for Ability-to-Pay Determinations.* The judiciary takes seriously its part in the collection of court imposed fines and restitution payments, and we welcome useful analysis and recommendations that will improve our performance. We appreciate that your review has raised some issues.

As we outlined during our meeting with you on April 7, our telephone conference calls on April 9 and April 14, and our written submissions on April 10, we have a number of concerns with certain aspects of the report. We also believe, however, that the report can be modified to be of great value.

Our general observations concerning the report are detailed in Enclosure 1 and summarized below:

The current "theme" of the draft, as suggested in the title and text, sends the wrong message, i.e., that probation offices do not have substantial guidance available to them.

We believe that the theme should be modified to inform readers that substantial guidance and training are already available and should be used. As GAO has noted in the draft regarding existing training in this area, and as expressed to us in recent conversations about our guidance, if courts followed these available resources, this alone would go a long way toward meeting the objectives that the GAO and the judicial branch seek to achieve. Such a modification would make the GAO report a valuable toot to help us inform the courts.

Extensive guidance does in fact exist, which resolves one of GAO's principle concerns.

It was not until our April 7 meeting that the Administrative Office (AO) realized that the study team did not review—indeed, did not have—much of the available guidance materials. As indicated in the extensive materials provided, as you requested on April 7, (see Enclosure 2 listing 20 documents on this subject), the AO *already* has developed and provided to the courts the very type of guidance materials that GAO found to be lacking. It is this very guidance which the Federal Judicial. Center (FJC) uses as its foundation for developing training.

As pointed out by FJC Director Zobel, the FJC, using Judicial Conference and AO policies, works in partnership with the AO and field probation officers to develop the training programs and attendant materials which the draft cites with appropriate praise and recognition.

The problems described in the draft are primarily performance issues. Although some individual probation officers may not be using or even be aware of the significant guidance that is available to them, as the study's examples and officer responses seem to suggest, the report should be revised to correct the erroneous premise that guidance does not exist.

The judiciary's governance structure should be taken into account to eliminate the impression that the AO has statutory authority to mandate compliance with the recommendations, as currently stated in the draft.

We believe that the report should describe the unique organizational structure of the judicial branch of government and make clear that it functions differently from the hierarchical executive branch agencies, including policy development, training, and program implementation.

By placing the roles of each component of the judiciary's governance structure into proper context, the report will enable its readers to better understand what can be done, and by whom, to improve officer performance. For example, the Judicial Conference and the AO develop policy guidance; the FJC has authority to train; and the individual judges have *sole* authority to set specific payment schedules and to require compliance by probation officers with the courts' directives.

Although there is no statutory authority for the AO, Judicial Conference, or FJC to require probation officers to attend or follow the training advice, there are steps we can take which we believe will substantially remedy this problem.

The report should clearly and prominently indicate that the review was a study of conditions in two courts and that there were markedly different practices between the two courts.

The report should recognize that the majority of the probation officers interviewed and whose cases were examined during the review in the Central District of California had not received FJC training, and many were relatively inexperienced. Moreover, the probation office in the Central District of California has one of the highest turnover rates in the country, further underscoring why the report should not attempt (either directly or indirectly) to project its findings nationally.

Thus, the title of the report is too broad in implying national ramifications, and the statement in the report that the two districts were selected because they are representative courts needs to be modified. The comment of the Department of Justice (DOJ) that these courts are not necessarily representative is correct.

The report needs to make clear that most of the cases reviewed pre-dated the requirements of the Mandatory Victims Restitution Act.

The report should explain that the study concentrated on cases in which sentencing took place *prior* to the enactment of the Mandatory Victims Restitution Act (MVRA). The report does not consider the important differences in the laws in effect then and now, as explained in our letter to GAO dated January 26, 1998, and in the DOJ's recent response to the draft.

The report should take greater note of the role of the Department of Justice in the execution of fines and restitution sentences.

The DOJ, through its United States attorney's offices' Financial Litigation Units (FLU), works closely with probation officers and is the primary entity responsible for collecting payment. As was discussed during one of our recent telephone conversations, in some districts the FLUs handle criminal debt collection in its entirety, a practice of which GAO is aware but did not examine for efficacy since it was outside the scope of the study.

We suggest that the report should recognize and take greater note of the DOJ role in the execution of fine and restitution sentences and avoid the appearance to readers * who are not fully familiar with this area, that the courts have sole responsibility in this area. Enclosure 3 provides specificity in this regard.

There are steps we are considering to improve program implementation and officer performance that we would like to have included in the report.

We agree that performance can be improved, and we are developing plans to do so. Accordingly, the report should note that in response to your study, we, are actively identifying steps that we can and will take to address these issues. These steps, as conceived so far, are outlined as follows:

- Strengthen the AO's program review and financial audit functions in this area.
- Review a larger, more representative sample of districts to see how these tasks are being performed, assist the districts in addressing identified problems, and revise the guidance and training as needed.
- Inform chief judges and chief probation officers nationwide about the importance of these issues and work with the courts to:
  1) assess how well ability-to-pay determinations are being made at the local level, and
  2) take steps to ensure that probation officers and their supervisors have adequate training to execute this important function properly.

  In this connection, the FJC stands ready to redistribute its *Desk Reference*, frequently cited in your draft as both a training guide for in-court implementation of judicial branch policies and an off-the-shelf resource for different types of investigation. It can also be updated as necessary and perhaps made available electronically, like other FJC publications. Officers may also wish to arrange local mining through the Internal Revenue Service (IRS) or other law enforcement agencies, if appropriate.
- Review and consolidate all financial investigation guidance so that it can be referenced readily by probation officers, and ensure it is widely distributed and also made available electronically to all officers on the judiciary's intranet.
- Consider specific guidance, if provided by the GAO, regarding particular financial standards. You have mentioned in conversations, for example, that GAO may be suggesting standards such as those used by the IRS.

  We offer two important points in this regard: First we agree with the caution raised by the DOJ that "debt collection is not an exact science, and is not readily adaptable to specific standards or guidance for repayment to be applied nationally," and second, that any recommendations you, wish us to consider in this area need to be very clear and specific, such as whether you are suggesting that we promulgate particular IRS or other agency standards.

Enclosure 4 provides specific comments and suggestions for modifying the draft report. We appreciate the open dialogue with you and hope that our resulting efforts will rove performance in this area.

Thank you for the opportunity to comment on the draft. Of course, we are available to provide any further assistance or clarification that you may need.

Sincerely,

CLARENCE A. LEE, JR., *Associate Director.*

Enclosures

ENCLOSURE 1

GENERAL OBSERVATIONS ABOUT THE GAO REPORT
APRIL 17,1998

The current "theme" of the draft, as suggested in the title and text, sends the wrong message., i.e., that probation offices do not have substantial guidance available to them.

The report should include all of the Administrative Office (AO) guidance provided to the courts in this area, which, in fact is substantial. As you know, our records indicate that during the audit, the AO was never asked to provide the GAO with copies of the guidance materials it has provided to the courts. The AO provided copies of these documents to the GAO on April 8, 1998, as you requested during our meeting on April 7. In addition, Enclosure 2 contains a complete list of the specific guidance provided to probation officers concerning financial investigations, including determination of an offender's ability-to-pay.

In addition, the report should recognize the benefits of local court training initiatives. The AO assists and encourages courts to develop local training initiatives and procedures that further complement national policies. We have provided the GAO with copies of correspondence sent to all courts that encourage such programs, along with documentation sponsoring local joint training sessions. As outlined in our January 26, 1998 letter to the GAO, in the past three years, the Northern District of Texas has participated in an eight-hour financial investigation training program presented by the Internal Revenue Service and sponsored by the local financial litigation unit in the United States attorney's office.

The Role of the Judiciary and its Various Components Should be Explained

As noted during our discussion and in the materials sent to the GAO on April 10, 1998, we believe that the report should describe the unique organizational structure of the judiciary, which functions differently from hierarchical organizations, such as executive branch agencies, in relation to policy development training, and program implementation. As an important part of this structure, consistent with the principles of administrative decentralization, each of the 94 district courts is granted by statute and practice a great deal of independent authority in managing its own affairs. This includes the authority to appoint supervise, and train its employees,, and. to establish local practices and rules of operation. Court officials, including chief probation officers, report to the court, not to program managers in Washington.

The Judicial Conference of the United States establishes policies; the AO provides guidance and establishes procedures to carry out the policies; and the Federal Judicial Center (FJC) works closely with the AO and teaches court staff the practical techniques and methods they need to implement the policies and procedures.

The AO and FJC work in partnership to develop FJC training programs that are based on policies adopted by the Judicial Conference through its various committees, developed and implemented by AO and court staff. The AO's program experts and the FJC training experts have worked closed together for many years, along with probation officers, to develop and provide core operational training for court probation office staff, including financial investigation training. For many years, funds were transferred to the FJC to cover the costs of these programs; and in fiscal year 1994, at the AO's request, Congress approved a permanent transfer of $1.1 million from the courts' appropriation to the FJC budget for new court personnel. The report should recognize this relationship since the FJC training is not separate from, but is built upon and is consistent with Judicial Conference policies.

As Judge Zobel's letter states:

> Lest there be any confusion about the basis for the FJC training that you described, you should be aware and I believe your report at page 17 should reflect the fact that the FJC training you cite is based on Judicial Conference and Administrative Office policies and program guidance with respect to fine and restitution. The training provides extensive additional guidance for the practical implementation of those policies, based on techniques and methods used by field officers and refined for training presentation through standard FJC curriculum development processes.

The Report Should Recognize the AO and FJC Partnership in Developing the Financial Investigation Training

In connection with financial investigations specifically, in 1992, an interagency group was convened (the second) by the FJC to assess emerging training needs. The

group included representation from the FJC, AO, United States Sentencing Commission, and representatives from the AO Chief Probation Officers Advisory Council. This group recommended the development of the financial investigation training package, referenced in the report, which incorporates all fine and restitution policies and supplements the system-wide program approved by the Judicial Conference Committee on Criminal Law (then known as the Committee on Probation Administration) in the 1980's.

The evolution of fine and restitution collection issues, a history of AO involvement, and a description of all of the training initiatives in this area are included in greater detail in Enclosure 3.

The report should clearly and prominently indicate that the review was a study of conditions in two courts.

The report should emphasize that it focuses on just two judicial districts, which represent only 1.4 percent of all offenders who have sentences that include criminal monetary penalties, that it uses 20 examples from the Central District of California and six from the Northern District of Texas, and that there are markedly different practices between the two districts. The report should also recognize that the markedly different practices could be attributed to the fact that the majority of officers interviewed and whose cases were examined in the Central District of California had not received the FJC training and were junior in experience. The report should also reference the GAO report entitled, *Federal Offenders: Trends in Community Supervision* (GAO/GGD–97110, August 13, 1997) that describes the current offender population, which presents a greater risk to the community and has more social, psychological, and medical problems than previous populations.

The report contains many anecdotes, which can often be used to arrive at a simple understanding of a complex issue, but they do not always present an accurate picture of fine and restitution collection in the federal system generally or in the two, districts specifically. Some of the examples in the report appear to be inaccurate, misleading, or even inflammatory due to the omission of significant facts. For instance, one example suggested that a monthly payment schedule had been set too low, but failed to take into account the offender's high medical expenses, averaging $2,000 a month, necessary for the care of the offender's child who suffers from cerebral palsy. Another example involved an offender who was not making adequate payments, but the report does not state that the offender's supervision was ultimately revoked by the court because of continued drug use and the failure to pay restitution.

In another example, the report suggests that an offender took a $6,000 European cruise with his wife even though the offender had reportedly not made a single payment toward, a $50,000 fine. In fact, the offender purchased non-refundable cruise tickets prior to his sentencing. The offender satisfied the $50,000 fine one month after the offender's release from a community corrections center and long before the offender went on the cruise. Most of the examples do not support the report's stated objectives to identify guidance available to judges and probation officers for making ability-to-pay determinations and to assess how such determinations are made. Enclosure 4 contains other suggested revisions and clarifications.

The report needs to make it clear that most of the cases identified pre-date the requirements of the Mandatory Victims Restitution Act.

As noted in our letter to GAO, dated January 26, 1998, the report seems to focus on the Mandatory Victims Restitution Act (MVRA) law currently in effect without adequate consideration of the laws in effect at the time most of the fine and restitution cases reviewed were imposed, even though the Congressional request was to determine how the MVRA was working. We have enclosed a list of suggested revisions and clarifications for the report (see Enclosure 4) that provides detailed information on why this distinction is important.

The report should take greater note of the role of the Department of Justice in the execution of fines and restitution sentences.

We also believe that the report should recognize and take greater note of the role of the DOJ in fine and restitution collection. Again, though the stated goal of the report is the assessment of ability-to-pay decision making, in fact the report raises issues of collection which cannot be understood without describing the major role of the DOJ. For instance, some of the examples in the report do not take into account the terms of plea agreements, which include specific requirements for offenders to sell assets to facilitate payment of fines and restitution. In other instances, the examples do not acknowledge that efforts could have been made by the DOJ to pursue collection, since the court authorized immediate payment of the fine or restitution.

The report should also recognize that collections can be enhanced when offenders are required to pay fines or restitution prior to sentencing. A number of the examples support the conclusion that offenders sentenced to periods of incarceration secrete or dispose of available assets identified in the presentence investigation report prior to their release to supervision. In addition, other examples reveal that those sentenced to probation sentences (without a term of imprisonment) generally make timely good-faith efforts to pay their fines and restitution based on identified ability-to-pay determinations made by probation officers. The report should also take into account forfeitures and other civil proceedings that may impact on an offender's overall financial condition pre- and post-sentencing.

There are steps we are considering to improve program implementation and officer performance which we would like to have included in the report.

As mentioned, we believe the report's conclusions need modification (particularly at page 46) in implying that improved guidance and oversight by the AO will result in significant increases in collection. Increased collections take place when enforced collection techniques (e.g., liens, garnishment, and seizures) are utilized by the DOJ. Ultimately, the only toot the judiciary has to address collection is the threat of supervision revocation. Revocation, in and of itself, rarely results in increased collections; rather, it reduces and nearly stops collection in most cases, since incarcerated offenders are usually unable to make significant payments.

Over the past decade, the imposition and collection of criminal monetary penalties have been the subject of scrutiny by all three branches of government. We have worked hard to establish vital lines of communication with the other branches, and our coordination efforts are much improved with the DOJ, which has the authority, responsibility, and enforcement techniques and tools to effect actual monetary payments to victim and the treasury. We do not believe that portions of the criminal debt collection process can be assessed in isolation without greater recognition of the role and responsibility of the DOJ. Enclosure 3 sets out, in part, the evolution of criminal debt collection issues and AO training efforts.

While recommendations in the report have merit, they should be modified.

While established guidelines exist only the courts have the legal authority to mandate that probation officers follow them. Nonetheless', there are steps we can and will take to help improve the performance of the probation officer by ensuring, for example, that each court makes our established guidance in this area available to officers. We can also remind officers that they should timely obtain a personal financial statement from the offender. Officers can also be reminded to obtain and review monthly written supervision reports submitted by offenders that include monthly income, including employment income and income from spouses, and other assets.

Moreover, we can remind them that they should require offenders to submit proof of earnings and use other. appropriate supervision techniques, including home inspections, to evaluate an offender's financial condition.

We believe the report identifies problems in at least one district. As we discussed during our meeting, we already have a substantial review process in place for this specific area, but only the courts have legal authority to require compliance. A copy of the supervision case review evaluation instrument used by the AO to conduct on-site reviews of probation, offices was provided to the GAO. While we do not believe that a review of two courts justifies a recommendation to correct what is not necessarily a systemic problem, we are, as we discussed at our meeting, nonetheless considering a special program audit in other districts to gauge the extent of the problems. We also believe that we can take steps to strengthen our existing review process so that any deficiencies are noted and corrective recommendations are made to the court.

ENCLOSURE 2

LIST OF SPECIFIC AO GUIDANCE TO PROBATION OFFICERS ON FINANCIAL INVESTIGATIONS

Guide to Judiciary Policies and Procedures, Probation Manual, Volume X, Chapter II, Part D: Financial Investigation (rev. November 30, 1990) that describes the purpose of financial investigation techniques in a probation officer's determination of ability to pay; establishes the format for reporting assets, debts, net worth, necessary expenses, and monthly cash flow to the court; establishes forms and procedures for conducting financial investigations; and outlines issues to be addressed when assessing ability to pay.

Guide to Judiciary Policies and Procedures, Probation Manual, Volume X, Chapter III, Part B, that describes sentencing options, including financial penalties, and pro-

vides additional guidance concerning fine and restitution, addressing such issues as ability to pay, enforcement and installment payment schedules.

Excerpt from the *Presentence Investigation Report*, Monograph 107 on Officers Analysis of Defendants Financial Condition Under the Sentencing Report Act of 1984 (March 1992) that instructs officers to consider the factors enumerated under 18 U.S.C. § 3572 with respect to ability-to-pay determinations, and includes model ability-to-pay sections in the presentence investigation report and other guidance.

Excerpt from the Judicial Conference Committee on the Administration of the Probation System materials on Conducting Financial Investigations (July 1997) that describes the purpose for the new financial investigation model that was later revised by the FJC.

Excerpt from the Judicial Conference Committee on Criminal Law Report on Financial Investigation Techniques (July 1987) that reflects the Committee's adoption of the model.

Financial Investigation Participants Handbook for U.S. Probation and Pretrial Services Officers (1988) produced by the Financial Investigation Task Force organized by the AO and approved by the Committee on Criminal Law. This model was used in developing the Financial Investigation Desk Reference (1994) produced by the FJC with AO and court personnel.

Joint Financial Training for United States Probation Officers and Assistant United States Attorneys (October 31, 1990) memo from Chief, Probation and Pretrial Services Division that describes the joint assistant U.S. attorney and probation officer training.

Prosecutor's Guide to Criminal Fines and Restitution Collection (December 11, 1992). Memorandum from Chief, Federal Corrections and Supervision Division[1] transmitting this monograph developed by the Executive Office for United States Attorneys which describes techniques for the enforcement of fines and restitution.

Reports from Department of Justice/Federal Judiciary Criminal Fines Task Force (October 4, 1990 and February 3, 1992) that describe efforts taken by the task force on training and other initiatives.

Violent Crime Control and Law Enforcement Act of 1994 (September 21, 1994) memorandum from Chief, Federal Corrections and Supervision Division that provides the provisions of mandatory restitution.

Update to Probation Officers on the Imposition and Collection of Fines and Restitution (September 1, 1995) memorandum from Chief, Federal Corrections and Supervision Division.

Antiterrorism and Effective Death Penalty Act of 1996 (May 31, 1996) memorandum from Chief, Federal Corrections and Supervision Division that describes the provisions of the act in connection with mandatory restitution.

Community Restitution Provision of the Mandatory Victims Restitution Act (February 18, 1998) memorandum from Chief, Federal Corrections and Supervision Division that describes the community restitution provisions and when officers should recommend the imposition of such restitution.

Imposition of Financial Penalties in the Second Circuit (March 5, 1998) memorandum from Chief, Federal Corrections and Supervision Division that describes suggested options for officers to consider when making recommendations to the court on the imposition and collection of fines and restitution.

News and Views Article: New Debt Collection Statute (June 10, 199 1). An article that advises officers that the presentence investigation report may be retained by the U.S. attorney's office and used for collection purposes.

Copies of various articles (June 198 1, September 1983, March and June 1986, September 1988, September 1990, and June. 1997) published in *Federal Probation*, a quarterly journal provided to all probation officers that contain various comprehensive analysis of case law involving payment schedules and other related fine and restitution issues.

The AO has also produced, distributed or revised several publications on fine and restitution matters including:

Imposition of Fines and Restitution Orders (May 15, 1992), a pamphlet to assist officers in making recommendations to the court on criminal monetary penalties.

What You Need to Know About Your Criminal Debt (1992), a booklet for offenders describing their responsibilities when ordered to pay a criminal monetary penalty.

Bringing Criminal Debt Into Balance: Improving Fine and Restitution Collection (June 18, 1992), a booklet describing coordination efforts between the probation officer, clerk's office, U.S. attorney's offices, and others necessary for effective criminal debt collection.

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[1] The titles Federal Corrections and Supervision Division and the Probation and Pretrial Services Division are synonymous.

The District Court Forms Package User Guide. including Instructions on Preparing the Judgments in a Criminal Case (rev. September 1996), a manual providing step-by-step instructions on preparing judgments to enhance criminal debt collection.

ENCLOSURE 3

EVOLUTION OF CRIMINAL DEBT COLLECTION ISSUES AND AO TRAINING EFFORTS

Over the past decade, the imposition of criminal monetary penalties has been the subject of scrutiny by all three branches of government. Fines have always been an important part of the penalty structure of federal criminal law. In recent years', an increasing number of federal offenses have included provisions for restitution and, with the passage of the Mandatory Victims Restitution Act of 1996, the imposition of such restitution became mandatory for certain offenses regardless of the defendant's ability to pay. The judiciary has strived to meet its responsibilities in this area.

As with money judgments in civil cases, sentences imposing fines and restitution in criminal cases are not self-executing but must be enforced by the party prevailing in the litigation. In criminal cases, of course, the prevailing party is the Government, and it is the United States Attorney or other DOJ counsel who have the ultimate responsibility and necessary authority to effect collection of fines and restitution on behalf of the Government or third parties. While this allocation of responsibility is clear, there are continued misunderstandings. The following history may assist in clarification.

The interest by Congress in criminal debt collection began in 1984 in the course of its ongoing review of federal debt management and criminal sentencing policies. In 1983–1984, both Houses conducted subcommittee hearings at which DOJ officials and judicial branch representatives testified about the methods, difficulties, and results of criminal debt collection activities. *Collection of Criminal Fines: Hearing before the Subcommittee on Energy, Nuclear Proliferation, and Government Processes of the Senate Comm. on Government Affairs*, 98th Cong., Sess. 56 (1984) and *Criminal Fine Enforcement: Hearings before the Subcommittee on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st and 2nd Sess. (1984). Central to the discussion was proposed legislation that would clarify debt collection responsibility, improve intergovernmental communication to aid the collection process, and make enforcement of criminal debt easier for the DOJ through liens, tougher penalties for non-payment, and other measures.[2]

The GAO also played an active role during this period. Among other things, the GAO reviewed seven judicial districts and, in its report, entitled *After the Criminal Fine Enforcement Act of 1984—Some Issues Still Need to Be Resolved* (GAO/GGD–86–2, Oct. 10, 1985), suggested that the quality and quantity of information on a defendant's financial condition varied within the same probation office and that the approach to gathering financial information was fragmented throughout the probation system. The GAO also noted the need for officers to provide more thorough and carefully verified financial information to judges. The outcome of the Congressional deliberations and the GAO's review was the Criminal Fine Enforcement Act of 1984 (Pub.L.No. 98–596, 98 Stat. 3134 (Oct. 30, 1984). In the House report that accompanied the legislation, it was noted that fine collection can be improved if the judiciary imposes reasonable fines, but that it is the responsibility of the DOJ to see to it that criminal fines are paid. H.R. Rep. 98–906, 98th Cong., 2nd Sess. (July 25, 1984).

Shortly thereafter, the GAO initiated a second investigation at the request of Senator Paul Laxalt, Chairman, Subcommittee on Criminal Law, Senate Judiciary Committee. In its fact sheet, entitled *Criminal Fines, Imposed and Collected as a Result of Investigations of the Organized Crime Drug Enforcement Task Force Program* (GAO/GGD–86–101, June 27, 1986), the GAO provided information on the dollar amounts of criminal fines which could have been imposed or were imposed by the courts at sentencing and the total amount collected as of December 31, 1985 for defendants prosecuted as a result of the Organized Crime Drug Enforcement Task Force Program.

In September 1986, the chairman of the House Judiciary Committee's Criminal Justice subcommittee introduced a bill to conform the Sentencing Reform Act of

[2] Since this time, the DOJ has been given explicit authority to collect restitution on behalf of nongovernment victims and has gained additional tools that assist in collection of unpaid fines and restitution, including the new debt collection provisions of the Mandatory Victims Restitution Act. Today, the DOJ has collection authority tantamount to the authority of the Internal Revenue Service.

1985 with the Criminal Fines Enforcement Act of 1984. While the focus of the hearing revolved around receipting of criminal debt payments, there still appeared be some confusion about the role of the judiciary and the DOJ in criminal debt collection. Judge Gerald Bard Tjoflat testified at a subcommittee hearing and pointed out that, under the U.S. Constitution, the courts have no power to collect money judgments, even when entered in favor of the Government. Quoting Alexander Hamilton, he observed that "[t]he Judiciary, on the contrary, has no influence over either the sword or the purse. . . . It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. . . .". We believe these arguments are compelling today, despite our efforts to adequately provide training to officers and to spearhead coordination efforts. The ultimate responsibility and authority for collection rest with the DOJ through its United States attorney's office financial litigation unit.

To follow up on the GAO recommendations, in 1986, the AO formed a Financial Investigation Task Force comprised of several probation officers all with substantial financial expertise, staff from the FJC and staff from the Federal Corrections and Supervision Division (then named the Probation Division) to develop a new financial investigation model for use in the presentence investigation. The model was a "collection-based" approach that emphasized the need for officers to calculate the offender's ability-to-pay based on "necessary expenses" and not simply expenses, and to separate encumbered and unencumbered assets.

The FJC with cooperation with the task force designed a multi-part curriculum to implement the new model. The model was pilot tested in several districts and refined. The training package was presented to the Judicial Conference Committee on Criminal Law (then named the Committee on the Administration of the Probation System) at its July 1987 meeting. The Committee approved further development and implementation of the financial investigation model, which provided that the format, instructions, and forms be reviewed by a certified public accountant or financial expert so the language and terms used would correspond to commonly accepted terminology.

In September 1987, the curriculum for the training package was completed. It included a trainer's guide, a participant workbook, and videotapes of interviews between officers and offenders of various kinds, including self-employed offenders, and was designed to provide uniform and timely training to officers throughout the system and to equip districts with in-court staff resources and knowledge. Each district was invited to designate an officer to attend a the program. All districts participated and completed in-district training by the end of 1988.

In 1989, the Criminal Fines Task Force was created by the AO and the DOJ to examine and further address issues concerning the imposition and collection of criminal debts. Members of the* task force included high-ranking officials from the DOJ, including Deputy Associate Attorney General Tim Murphy, an AO Assistant Director, and Judge Vincent Broderick and Judge Stanley Harris in their capacities as members of the Judicial Conference Committee on Criminal Law.

This task force first met on October 5, 1989 and held regular meetings up until late 1992. Annuals reports were prepared for the Chief Justice of the United States and the Attorney General on October 4, 1990 and February 3, 1992. The task force examined and addressed issues concerning the imposition and collection of criminal debts and met a number of objectives that contributed to better coordination in criminal debt collection and management.

Among other things, the task force played an essential role in the revision of the Judgment in a Criminal Case, making it easier for the DOJ to pursue collection of outstanding criminal debts. The task force also developed a Criminal Debt Management Plan, adopted by the Attorney General's Advisory Committee of United States Attorneys. This plan was implemented in every United States attorney's office and probation officers were appraised of the plan in a memorandum sent to all chief probation officers in October 1990.

The task force created, sponsored, and piloted the first in-district joint training conference in May 1990 in the Eastern District of Pennsylvania. Since that time, AO and DOJ staff have participated in these joint sessions held in almost every district. In fiscal year (FY) 1990, two sessions were held; in FY 91, 66 sessions were held; and in FY 92, 23 sessions were held. Overall, more than 3,150 court staff made up of probation officers and financial litigation unit staff from the United States attorney's offices received the training.

Upon the recommendation of the task force, several publications were produced or revised and distributed, including the *Prosecutors' Guide to Fine and Restitution Collections* (rev. December 11, 1992); *Imposition of Fines and Restitution Orders* (May 15, 1992); *What You Need to Know About Your Criminal Debt* (1992); *Bringing*

Criminal Debt Into Balance: Improving Fine and Restitution Collection (June 18, 1992); and the *District Court Forms Package User Guide, including Instructions on Preparing the Judgments in a Criminal Case* (rev. September 1996).

In 1991 the Federal Debt Collection Procedures Act of 1990 (Public Law No. 101–647, May 29, 1991) was enacted for the enforcement of criminal debt. The Federal Debt Collection Procedures Act codified 18 U.S.C. § 3551(d), the provisions of Federal Rule of Criminal Procedure 32, allowing the retention of the presentence investigation report by the attorney for the government for use in collection financial penalties. This provision ensured that documented assets contained in the presentence investigation report could be pursued by the United States attorney's office.

In 1992, in connection with financial investigation specifically, an interagency group (the second) was convened by the FJC to assess emerging training needs. The group included representation from the FJC, AO, USSC, and representatives from the AO Chiefs Advisory Council's Training and Education Committee. This group recommended the development of a new financial investigation training package with additional information, techniques, and skills to supplement the 1980's system-wide program approved by the Judicial Conference Committee on Criminal Law. An advisory committee was formed made up of FJC, AO staff, and local probation officers. After a series of meetings throughout the system, assignments, and pilot testing, the FJC *Desk Reference* was developed and refined. This training was an expansion of the earlier training and included components for pretrial services officers and procedures to analyze the finances of individual and organizational defendants with limited and complicated financial portfolios. The *Desk Reference* was distributed to all districts with instructions for implementing and requesting additional copies. The FJC also provides financial investigation training in its new officer orientation program. In its modified version of the 1988 package, experienced probation officers teach investigation techniques and complement the information in the *Desk Reference.*

After the GAO published a report entitled, *Thrift Failures, Federal Enforcement Actions Against Fraud and Wrongdoing in RTC Thrifts* (GAO/GGD–93–93, August 10, 1993), describing the status of civil and criminal enforcement actions that the federal government had taken against suspected and actual wrongdoing in failed thrifts under the control of the Resolution Trust Corporation (RTC), the AO began working closely with the Executive Office for United States Attorneys, the RTC and the Federal Deposit Insurance Corporation (FDIC) to establish procedures to identify, reconcile, prioritize, and develop collection strategies for financial institution fraud cases. Since 1993, the AO also has actively participated in the development and implementation of regional training programs designed to addressed coordination issues between agencies for outstanding criminal restitution orders. This program includes probation officers, United States attorney's office personnel, and legal and regulatory staff from the FDIC and RTC. The next session is scheduled in May of this year.

ENCLOSURE 4

GAO REPORT, STANDARDS NEEDED FOR ABILITY-TO-PAY DETERMINATIONS DETAILED SUGGESTIONS FOR REVISIONS TO THE REPORT

Page 2, paragraph 1

The statistics cited should include a reference to the source. This section should also be expanded to note that there are currently 91,434 offenders on federal supervision. According to AO officials studying federal offenders sentenced over the past two years, approximately 34,196 offenders have sentences that include a fine, restitution or both. Moreover, of the 144,040 federal defendants sentenced between 1995–1997, almost 63 percent required court-ordered appointed counsel based on their limited financial means.

The report should also included a note that the 495 samples are from two of 94 districts and represent approximately 1.4 percent of all offenders who have sentences that include criminal monetary penalties.

Page 2, paragraph 2

We recommend that this paragraph be revised to reflect the language contained in the guidelines or the Mandatory Victims Restitution Act of 1996:

> Under the Mandatory Victims Restitution Act of 1996 and the Sentencing, Guidelines, a person sentenced to pay a fine or other monetary penalty, including restitution, shall make such payment immediately, unless in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in

equal monthly payments over the period provided by the court, unless the court establishes another schedule. 18 U.S.C. §3572. In determining the method of payment, 18 U.S.C. §3664(f)(2) directs the court to consider the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled; the income and projected earnings of the defendant; and the financial obligations of the defendant, including obligations to dependants.

A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. *See* 18 U.S.C. §3664(f) or U.S.S.G. §5E1.1(e).

Page 2, paragraph 3

The report should be revised to acknowledge that probation officers have prescribed criteria for determining offenders ability to pay a fine or restitution. The first criteria, approved by the Judicial Conference Committee on Criminal Law, was published in 1987 with the first national training program on financial investigations. All districts participated and completed this in-district program in 1988. As explained in the materials sent to GAO on April 10, 1998, the report should recognize that all of the relevant AO guidance served as the foundation for the FJC financial training and that as such, the training is not separate, but is an instrument of AO. policy implementation. In addition, specific. guidance has been provided to officers as listed in enclosure 1 should be included in the report.

Suggested Replacement Language: As will become clear in this report, probation officers in the two districts reviewed did not make effective use of prescribed criteria for determining an offender's ability-to-pay a fine or restitution.

Page 3, paragraph 1

As reported to GAO in our letter dated January 26, 1998, most of the cases reviewed and identified in this report were for offenses that occurred prior to the enactment of the Mandatory Victims Restitution Act (MVRA) even though the Congressional request was to determine how the MVRA was working. We would recommend that the report reflect that the cases reviewed were all pre-MVRA cases.

The MVRA became effective for offenders convicted on or after April 24, 1996. An offender sentenced prior to April 24, 1996 remains subject to the prior law. Since the report describes cases sentenced after January 1, 1990 up through and including October 1997, at least six and one half years of sentencings (out of a maximum of seven and one half years, of data) would have been handled under the prior law. As a result, the report does not take into account important differences between the prior and new laws as noted below.

The report states that according to the MVRA, offenders should pay their court-ordered fines and restitution as a lump sum payment and that if a lump-sum payment cannot be made, installment payments are to be made. Although these statements are generally true since full and immediate payment of restitution is presumptive in the MVRA. However, judges have considerably more discretion under pre-MVRA law.

For example, pre-MVRA law provides that if the court ordered a defendant to pay restitution, it was to be paid immediately unless the court specified a different payment schedule. 18 U.S.C. §3663(f)(3). If the court ordered payments to be made over a specified period or pursuant to an installment plan, the period could end no later than (1) the end of the period of probation, if probation is ordered, (2) five years after the end of a term of imprisonment if * no probation is ordered, and (3) five years after the date of sentencing in any other case. 18 U.S.C. §3663(f)(2).

Fines were treated nearly the same under prior law, since the court had the authority, in the interest of justice, to establish a payment plan. If the court chose this option, the statute provided that, unless the court ordered otherwise, payments were to be made in equal monthly installments over a period not to exceed five years after the offender was released from prison. 18 U.S.C. §3572.

Suggested Replacement Language: Most offenders in our sample were sentenced under the provisions of pre-MVRA law and paid their court-ordered fines and restitution, not as a lump sum, but with installment payment schedules.

Delete Sentence 2

Delete Sentence 3

Page 3, paragraph 1

We recommend that this paragraph be revised to acknowledge that the AO has defined realistic payment schedules but note that such a task is difficult since officers are confronted each day. with thousands of individual and difficult cases whose financial condition changes over time. We also recommend that this paragraph ac-

knowledge that the AO enlisted the services of the FJC to conduct training for officers on financial investigations that you have outlined elsewhere in the report.

Suggested Replacement Language: The AO recommends that probation officers set realistic payment schedules based on specific guidance as incorporated in the FJC financial investigation training to probation officers. This training. . . .

Page 4, paragraph 1

We recommend that the statement that probation officers were not required to follow the financial investigation training in making ability-to-pay determinations be revised.

Suggested Replacement Language: Recognizing the judiciary's unique organizational structure, probation officers are not required to take the training or adopt the lessons learned in the training if they take it.

Page 4, paragraph 2

Suggested Replacement Language: The two districts reviewed developed local training initiatives and procedures that should have further complement national policies.

We also recommend that this paragraph be expanded to, note that this conclusion was based on a review of 182 cases in the Central District of California and 204 cases in the Northern District of Texas in which 70 cases in the Central District of California were identified by GAO has having inconsistencies compared to the 29 cases in the Northern District of Texas identified as having inconsistencies.

Page 5, paragraph 2

We recommend that this paragraph be expanded to note that the officers interviewed by GAO dispute these conclusions and believe that these statements do not accurately characterize discussions they had during the interviews.

Suggested Replacement Language: Based on the cases reviewed, it appears to be distinctions between an officer's ability to make determinations about an offender's ability-to-pay when an offender is sentenced to probation (without imprisonment) with those sentenced to a period of incarceration. Offenders sentenced to imprisonment secret or dispose of assets identified in the presentence investigation report while in prison and prior to release to supervision. In addition, it appears that an offender's earning potential diminishes following a period of prison. Collections could be enhanced if offenders are required to pay fines and restitution prior to sentencing.

Page 5, paragraph 3

The report states, that some offenders identified expenses as necessary, which limited their ability to pay fines to the government or restitution to victims.

As outlined later, according to the districts, in some instances where such expenses where noted, outstanding fines and restitution obligations had already been satisfied. The report should be revised to reflect those instances.

Page 6, paragraph 1

According to the report, personal financial statements were often 18 months old or older for offenders who were on installment payments, so probation officers were not in a good position to tell whether the payment amount should be changed.

The report should be revised to clarify that personal financial statements are not the sole means by which officers review the financial conditions of offenders. Each month offenders are required to complete and submit to the probation officer monthly written supervision reports that include monthly income, including employment income, including income from spouses, as well mother assets. Offenders are also required to submit proof of earnings to the probation officer each month. Officers also use other supervision techniques, including home inspections, to evaluate an offender's financial condition.

Page 6, paragraph 3

The report should also acknowledge that the disparity in the number of issues identified by the GAO in the California and Texas districts. Of the examples sited, only six came from the Northern District of Texas while the remaining 19 came from the Central District of California. Moreover, as outlined later, some of the examples are inaccurate and omit specific circumstances of mitigation.

Page 7, paragraph 1

We think it would be helpful to note the differences between collection actions in probation cases and in cases where the offender has served a period of incarceration.

As noted later, in some instances, the assets the auditors identify as being available for payment toward criminal monetary. penalties had been identified by officers

in the presentence report which pursuant to F.R.Crim. P. 32 is provided to the defendant and the government at the time of sentence and had been liquidated shortly after sentencing or during the offender's imprisonment. At the beginning of supervision, I in some instances several years later, the previous identified assets were no longer available. The Federal Debt Collection Procedures Act recognized this problem and authorized the United States attorney's office to retain the presentence investigation report for collection purposes.

Page 9, paragraph 2

The report states that the U.S. Sentencing Commission also has responsibility for interpreting sentencing provisions of the law. The report should be revised to clarify the Sentencing Commission's role. Nowhere in titles 18 or 28 is the Commission given the responsibility for interpreting the law. Only the courts interpret the law.

Suggested Replacement Language: The Sentencing Commission has the responsibility to establish sentencing policies and practices by means of sentencing guidelines and policy statements. 28 U.S.C. § 991 and 994.

Page 10, paragraph 3

Please see our previous comments as they related to page 2, paragraph 1.

Page 13, paragraph 3

The report indicates that the GAO did its work from March 1997 through October 1997, but it makes no reference to the fact that the auditors first begin their review of the case files in the Northern District of Texas and the Central District of California in April 1996 when the GAO begin a self-initiated study of fees assessed on federal offenders to defray costs incurred by the federal government in the administration of justice. We recommend that the report be revised to reflect the total amount of time—frorn April 1996 through October 1997—auditors spent reviewing cases in the districts.

Pages 14–15

We recommend that the report be revised to include financial standards and other guidance documents provided to probation officers as provided in Enclosure 2.

Page 16

We recommend that the reports describe the natural nexus between various judiciary components in relation to policy development, training, and local implementation. The report should note that local courts are assisted and encouraged to develop local training initiatives and procedures that further complement national policies. The report should also note that in the past three years, officers in the Northern District of Texas have participated in an 8-hour financial investigation training program presented by the Internal Revenue Service and sponsored by the local financial litigation unit in the United States attorney's office.

Page 19, paragraph 3

As outlined in the FJC letter to GAO commenting on the report, there appears to be confusion over the use of the Consumer Expenditure Tables published by the Bureau of Labor Statistics in the training, and the report unfairly characterizes officers necessary expense determinations. We recommend that all references that criticize officers for presenting recommendations that do not comport with the tables should be deleted in the report.

Page 21

Inconsistencies In Ability-To-Pay Determinations Created Apparent Inequities

We do not believe the inconsistencies described in the examples are based on inequities in ability-to-pay determinations but instead reflect the inconsistencies between pre-MVRA and MVRA law. We recommend the examples be deleted from the report. If the examples are not deleted, we recommend the report include the following:

The report should acknowledge the DOJ role in collections, including the Inmate Financial Responsibility Program (IFRP). Under the program regulations, prison officials can collect inmate earnings or facilitate collection of fine and restitution from assets. identified in the presentence investigation report.

In most instances, the GAO has identified installment payment cases but fails to take into account that offenders were sentenced to periods of incarceration. According to the judgments in those cases, in most instances offenders were directed to make immediate fine and restitution payments. The judgments further direct officers to establish payment schedules at the commencement of supervision if outstanding unpaid balances remain. For incarcerated offenders who are ordered to pay

financial penalties immediately, the IFRP authorizes collection by prison officials. The Department of Justice also generally takes immediate action to pursue collection using all of its various enforcement techniques when the judgment authorizes immediate collection.

Pages 23–24

The GAO reiterates its list of issues during, the review that have been previously identified in other portions of the report. We refer to other comments provided elsewhere in this summary.

No Mandatory Standards Exist for What Types of Assets Should be Made Available for Lump Sum Payments.

Page 25

While the GAO report makes a minor reference to the personal financial statement in a footnote, suggesting that the statement is used by officers in compiling financial information in a complete and uniform manner, one of the focal points of the handbook and *Desk Reference* is the AO staff developed Personal Financial Statement, Probation Form 48A, which is used by 6fficers not just to compile financial information, but as a tool for analyzing the financial information and determining an offender's ability-to-pay.

We believe standards have been provided for what types of assets should be made available for lump sum payments. However, only the courts have the legal authority to mandate that probation officers follow them. We recommend that these examples be deleted from the report. If the examples are not excluded, we recommend that they be clarified as follows.

Page 27, paragraph 1

According to the GAO report, an offender was sentenced to 12 months in prison and 36 months supervised release. He was ordered to pay a fine of $15,000 and restitution of $153,000. The offender reported a monthly income of $3,000 and was required to make monthly installment payments of $100. While under supervision, he sold a second home valued at over $850,000 and did not report what he did with the $290,000 proceeds in equity from the sale. Court records show the Proceeds were not applied toward the fine or restitution. The probation officer supervising the case said he did not know what the offender did with the proceeds from the sale.

We recommend that the report clarify that the offender was sentenced in another district and the judgment ordered payment of the restitution within 7 days from sentencing to the United States attorney's office to be transferred to the victim and that the fine was also due immediately. According to court records, the Central District of California accepted supervision of this case one year later. The property was sold in accordance with the terms of a plea agreement, prior to sentencing for $680,000 rather than the amount of $850,000 that the offender estimated on his personal financial statement prepared five months prior to sentencing for a net profit of $52,000. It appears that no action was taken at the time of sentencing to ensure that the proceeds from the sale were applied to the restitution order.

Page 27, paragraph 2

According to the GAO report, the offender was sentenced to 72 months in prison and 36 months of supervised release. He was ordered to pay a fine of $32,000 and a restitution of $8,000. The auditors reported that while the offender reported a monthly income of $2,800 and expenses of $1,700 and was required to make monthly installment payments of $200. While under supervision, the offender sold $20,000 work of securities but did not report what he did with the proceeds.

We recommend that the report be revised to note that restitution was ordered by the court to be recovered by the government through forfeiture under RICO provisions, leaving the offender responsible for the $32,000 fine and that the financial litigation unit in the United States attorney's office has been unsuccessful in recovering the money. We also recommend that the reported be revised, since the monthly expenses for this offender are approximately $1,950 rather than $1,700.

Page 28, paragraph 1

According to the GAO report the offender was sentenced to 36 months in prison and 36 months of supervised release. He was to pay over $100,000 in restitution. The offender was required to make month payments of $400 to his victims. He reported a monthly income of $4,600 and expenses of $3,200. The probation officer said he was aware of the a painting owned by the offender that was valued at $185,000 but the offender was not required to sell or borrow against it to pay restitution to his victims.

We recommend that the report acknowledge that while the offender initially reported sole ownership of the painting, he later reported to the probation officer that the painting was owned jointly with his mother and she was not willing to sell.

Page 28, paragraph 2

According to the GAO report the offender was sentenced to 46 months in Prison and 36 months of supervised release. Restitution in the amount of $1,450 was ordered. The auditors report that the offender reported earnings of $1,638 a month and expenses of $1,190. A monthly payment schedule of $50 was set. The offender reported receiving a legal settlement of $6,500 but was not required to use the money to pay the restitution.

We recommend that the report be clarified to note that the legal settlement was awarded in Philadelphia and the officer did not become aware of it until after the offender had spent the money. We also recommend that the report mention that the offender was a serious drug offender whose release was ultimately revoked for no less than 12 urinalysis stalls, failure to report for three months, a positive drug test, and for his failure to pay the restitution.

Page 28, paragraph 3

According to the GAO report the offender was sentenced to 3 years probation, fined $3,000 and ordered to pay restitution of $1,995. The auditors report that the offender had over $65,000 in a personal savings account and was allowed to pay $90 per month. The GAO also reports that the officer stated that as long as the offender made the $90 payments he left him alone.

The report should mention that the offender was sentenced in another district and had already paid the restitution in full.

Page 29, paragraph 2

The report states that an offender, a doctor, was sentenced to 60 months of probation and 3,000 hours of community service. The offender was also fined $10,000. The probation set the installment payment at $200 per month. The offender reported real estate worth over $1,000,000 with over $900,000 in equity and over $500,000 in cash assets including $20,000 in a personal bank account. The probation officer supervising the case told us that it was not necessary for the offender to pay off the fine any sooner than by the end of the offender's 60-month probationary period.

The report should note that the. offender's financial situation changed as a result of her conviction and that the United States attorney's office had a lien filed against her property and the fine was satisfied.

Page 30, paragraph 1

According to the GAO report the offender was placed on 3 years probation and ordered to pay a $1,500 fine. The offender reported having over $25,000 in the bank. The probation officer on this case also told us that immediate payment was not expected of offenders and set a payment schedule of $50 per month.

The report should mention that the offender resided in a community corrections center for the first 6 months of supervision and that the fine was paid in full.

No Mandatory Standards are Required for Setting Installment Schedules

We believe standards have been provided to officers to assist them in setting installment schedules. As noted above, we recommend that the report acknowledge that only the courts have the legal authority to mandate that probation officers follow the standards. We also recommend that the report recognize that collections can be enhanced,if offenders are required to pay fines and restitution prior to sentencing since some of the following examples support our long-held belief that an offender's earning potentials are diminished following a period of incarceration. Moreover, some of the examples support the belief that an offender has time during incarceration and prior to release to supervision to secret or dispose of identified in the presentence investigation report. We recommend that the following examples be deleted from the report. If the examples are not excluded, we recommend the following clarifications be included in the report.

Page 33, paragraph 1

According to the GAO report the offender was sentenced to 33 month in prison and 36 months supervised release. He was also fined $3,000. The offender reported an average monthly income of over $2,000. The probation officer said she determined an installment payment schedule by suggesting payment amounts until the offender heard an amount he thought he could live with.

We recommend that the report note that the judgment orders the payment of the fine immediately and that any unpaid balance be paid during the term of super-

vision as directed by the probation officer. We also recommend that the report acknowledge efforts could have been made by the U.S. attorney's office to pursue collection while the offender was incarcerated either through the Bureau of Prisons IFRP or by pursuing any assets identified in the presentence report. We would also note that the probation officer states that at no any time was the offender allowed to set his own payment schedule.

Page 33, paragraph 2

According to the GAO report the offender was sentenced to 5 years in prison and 4 years of supervised release. He was also fined $6,000. The offender reported a monthly income of $2,200. The probation officer selected a monthly payment amount of $100 because he said it was a nice round number.

We recommend that the report note that the fine was due immediately and that the court ordered that following the offender's incarceration the unpaid balance of the fine will be paid during the term of supervision at a rate amortized over 3 years. We also recommend that the report acknowledge that efforts could have been made by the U.S. attorney's office to pursue collection while the offender was incarcerated either through the Bureau of Prisons IFRP or by pursuing any assets identified in the presentence report. We would also note that officer also denies stating that $100 was a nice round number and it is the officer's practice to require an offender owing a fine to begin paying $100 a month at the initial meeting unless the offender can substantiate why a lower payment is appropriate.

Page 33, paragraph 3

According to the GAO report the offender was sentenced to 18 months in prison and 36 months supervised release. He was also fined $3,000. The offender reported a monthly income of $4,600. The probation officer said that the offender's previous probation officer had established a payment schedule of $50 per month and the officer did not know how that figure was arrived at but it appeared to be a good faith payment.

We recommend that the report note that the judgment ordered that the fine due immediately and any unpaid balance be paid during the term of supervision as directed by the officer. We also recommend that the report acknowledge that efforts could have been made by the U.S. attorney's office to pursue collection while the offender was incarcerated either through the Bureau of Prisons IFRP or by pursuing any assets identified in the presentence report.

We also recommend that the report be clarified to note that monthly income of $4,600 was gross income and that the offender was initially instructed to pay $50 per month based upon unstable income, but that as the income stabilized the payments were increased to $150.

Page 34, paragraph 1

According to the GAO report the offender was sentenced to 24 months in prison and 36 months supervised release. He was ordered to pay restitution of $2.8 million. The offender reported a monthly income of $4,000. The probation officer said that he arrived at a monthly payment of $50 by bartering with the offender.

We note that the officer states that the word "barter" was never used or implied during the interview with GAO. We would recommend that the report note that the offender made a $10,000 payment at sentencing and that the U.S. attorney's office had liens filed on the offender's property.

Page 34, paragraph 2

According to the GAO report the offender was sentenced to 3 years in prison and 60 months of supervised release. He was ordered to pay $1 million in restitution. The offender reported monthly income of $1,700. The probation officer accepted $50 as an installment amount because, he said, he didn't know how to handle this case.

We recommend that the report clarify that the $50 a month payment schedule was based upon the offender's monthly income of $600 which excluded social security benefits. We would note that the officer recalls telling the auditor that he was not familiar with the procedures of how the offender might sell his bank stock.

Arbitrary Methods Affected Lower Income Offenders

We do not believe that officers use arbitrary methods to determine an offender's ability-to-pay or that such methods have affected lower income offenders. We believe the below examples reflect distinctions between pre-MVRA and current law and identify that offenders sentenced to probation supervision (without imprisonment) generally make timely, good-faith efforts to pay fine and restitution on identified ability-to-pay determinations made by the probation officers. We recommend that

the examples be deleted from the report. If the examples are not excluded, we recommend the inclusion of the following information.

Page 35, paragraph 2

According to the GAO report the offender was sentenced to I month in prison and 60 months supervised release. She was ordered to pay about $8,000 in restitution. The offender,, who has four children, reported monthly income of $737 from welfare. The probation officer set the monthly installment payment at $50.

We recommend that the report mention that the offender was living with her parents to reduce expenses and was paying restitution in the amount of $140 a month. Over time the offender was required to assist with living expenses and the payment amount was appropriately reduced to $50 per month.

Page 35, paragraph 3

According to the GAO report the offender was sentenced to 24 months probation. He was ordered to pay $900 in restitution. The offender had a wife and four children. He reported a monthly income of $800. The probation officer set the monthly payment at $50.

We recommend that the report reflect that the offender had a $130 a month cash flow.

Page 35, paragraph 4

According to the GAO report the offender was sentenced to I day in prison and 36 months supervised release. She was ordered to pay $32,000 in restitution. She reported monthly income of $2,400. The probation officer set the payment schedule at $1,000 a month.

We recommend that the report note that the offender is living at home with her mother and reports $1,800 per month income against expenses of $500 per month.

No Mandatory Standards Exist for the Type or Amount of Expenses Considered Necessary.

As mentioned above, standards have been published for the type and amount of expenses probation officers should consider necessary when determining an offender's ability-to-pay. However, only the courts have the authority to make such standards mandatory. Moreover, we believe the following examples illustrate how an offender's earnings potential are diminished following a period of incarceration. In each of the examples, an offender was released from prison and reported expenses conducive to the offender's standard of living prior to incarceration. We recommend that the examples be deleted from the report. If the examples are not deleted, the following clarifications should be noted in the report.

Page 38, paragraph 1

According to the GAO report the offender was sentenced to 12 months in prison and 36 months supervised release. He was ordered to pay over $160,000 in restitution. The offender reported average monthly income of about $12,000 and over 14,000 in necessary monthly expenses for himself, his spouse, and one dependent child. The necessary monthly expenses include mortgage payment expense of about $6,000, entertainment expenses of $350, clothing expenses of $400, and $5,000 of unspecified miscellaneous expenses. The offender was required to make monthly restitution payments of $300.

We recommend that the report mention that the financial litigation unit in the United States attorney's office had a lien filed on the offender's home.

Page 39, paragraph 1

According to the GAO report the offender was sentenced to 60 months probation. He was also fined $50,000. He reported a monthly income of $5,000 for himself and $10,000 for his spouse. The offender reported over $12,000 in necessary monthly expenses, including over $5,000 in monthly mortgage expenses and $1,500 in monthly groceries and supplies expenses. The offender reported taking a $6,000 European cruise with his wife. However, the offender had not made a single payment toward the fine in the first 10 months of probation. The probation officer had not established a payment schedule at the time of our review.

We recommend that the report be revised to note that the offender purchased the non-refundable cruise tickets prior to his sentencing and that the offender satisfied the $50,000 fine one month after release from a community corrections center and.long before going on the cruise.

Page 39, paragraph 2

According to the GAO report the offender was sentenced to 10 months in prison 24 months of supervised release. He was also fined $5,000. The offender reported

monthly income averaging $2,500 and expenses of $2,335. His month payment was set at $210. He made two payments and stopped because of a self-declared inability to pay because of all of his expenses. After he stopped making payments, the offender moved from an $800 monthly rental home to a $1,400 monthly rental home in the same area. The probation officer took no action.

We recommend that the report be revised to note that offender moved to a community with a higher standard of living that was 160 miles away from his previous residence.

Page 40, paragraph 2

According to the GAO report the offender was sentenced to 30 months in prison and 36 months of supervised release. He was also ordered to pay $35,000 in restitution. He reported a monthly income of about $7,600 and expenses of about $7,500. His reported monthly expenses included $800 for car payments and $960 for private school, tuition. The probation officer originally set the monthly installment payment at $100 and increased it to $200 at the time of our review.

We recommend that the report mention that the judgment ordered that the restitution be paid over the period of supervision in installments determined by the probation officer based on the offender's ability to pay and that the court also ordered that the schedule and ability to pay be reevaluated on a year to year basis. We believe the report should further be revised to reflect that the offender's excessive expenses were due, in part, to the offender having a child that suffered from cerebral palsy and medical bills averaging approximately $2,000 a month.

Page 40, paragraph 3

According to the GAO report the offender was sentenced to 6 months in prison and 36 months of supervised release. He was also ordered to pay $20,000 in fines and about $134,000 in restitution. The offender reported monthly income of $3,400 and monthly expenses of $3,600, including rental expenses of $1,850 and a car lease at $400. He was required to make monthly payment of $500. The report adds that despite reporting expenses that regularly exceeded income, the offender, who had no dependents, moved from the apartment costing $1,850 per month to an apartment costing $2,400 per month while under court supervision.

We recommend that the report be corrected to reflect that the individual moved from an apartment that cost $1,450 to one that cost $1,085.

Page 41, paragraph 2

According to the GAO report the offender was sentenced to 6 months in prison and 48 months of supervised release. The offender was ordered to pay about $33,000 in restitution. The offender reported monthly income of over $7,500 and expenses of about $7,000. Included in the expenses was a monthly payment of $750 to the offender's sister. The probation officer set the monthly payment at $100.

We recommend that the report be revised to mention that the officer had made an agreement with this 64-year-old offender had agreed to pay off the restitution in full when she turned 65 and would receive a lump sum retirement settlement.

Cases with Outdated or Missing Financial Statements

We recommend the following corrections.

Page 43–44, 1 paragraph

According to the GAO report the offender was sentenced to 6 months in prison and 24 months of supervised release. He was also ordered to pay $38,00 in restitution. The probation officer set the installment payment at $200 a month, and this amount was not changed. The offender's most current financial statement was 60 months old. Other information in the his file showed that his income has almost double; there was no information on changes in expenses, assets, or cash flow.

We recommend that the report be corrected to reflect that the offender's $1,500 income and liabilities have remained constant throughout the period of supervision.

Page 44, paragraph 2

According to the GAO report the offender was sentenced to 5 months in prison and 36 months of supervised release. She was also ordered to pay $75,000 in restitution. The probation officer set the installment payment at $150 per month. Her latest financial statement was 36 months old and at the time of our review showed monthly income of over $4,000 and monthly expenses of $3,385. The offender requested a reduction in payments, claiming financial hardship. During the time of the hardship, the probation officer approved recreational travel for the offender outside the court district boundaries.

We recommend that the report be revised to note that the offender was earning $4,000 a month prior to her incarceration but that her income changed to average $1,250 during the term of supervision. The report should also be corrected to reflect that the travel was work related and not for recreational purposes.

Determining Victims and Harms for Restitution in Federal Criminal Cases

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A. History of Federal Restitution Law

1925 **Federal Probation Act (FPA)** - Restitution imposable only as condition of supervision

1982 **Victim Witness Protection Act (VWPA)** - 18 U.S.C. §§ 3579, 3580
Restitution as separate component of sentence
Discretionary restitution - court must balance harm with defendant's ability to pay

1984 **Sentencing Reform Act** - Recodified VWPA at §§ 3663 and 3664; reaffirmed restitution as one of several, separate components of a sentence.

1990 ***Hughey v. U.S.*** - S. Ct. allows restitution only for harm caused by offense of conviction

Amendments to VWPA:
1) restitution for scheme, pattern, conspiracy - if element of offense (§ 3663(a))
2) parties can agree to restitution to any extent, in any case (§ 3663(a)(3))
3) parties can agree to restitution to other than victims of offense (§ 3663(a)(1)(A))

1992 **Mandatory restitution for Child Support Recovery Act (CSRA)** - 18 U.S.C. § 228

1994 **Mandatory restitution for certain title 18 offenses, such as violence against women, exploitation of children, and telemarketing** - 18 U.S.C. § 2248, 2259, 2264, 2327.

Amendment to VWPA:
Restitution for victims' lost income, transportation, child care, and other expenses related to participation in investigation and prosecution of case - § 3663(b)(4).

1996 **Mandatory Victims Restitution Act (MVRA)** - §§ 3663, (new) 3663A, and 3664; and changes to title 18, subchapter C of chapter 227, and subchapter B of chapter 229 (on financial collections). Created mandatory restitution for most non-drug federal offenses; to victims harmed "directly and proximately"; strengthened enforcement of restitution and fines (e.g., government to collect for 20 years after incarceration of defendant).

Current Trends or Issues:

Courts generally construe offense of conviction and causation narrowly, but construe whether harms are compensable as restitution more broadly.
Still unclear what effect "directly and proximately" may have on causation/victims/harms analysis; will possibly slightly expand analysis.
Not clear whether conspiracy, scheme, or pattern must be element or evident from proof.
Can expect increased government oversight of imposition and collection of financial penalties (see, e.g., 1997 and 1998 GAO studies)

B. Steps in Determining Victims and Harms for Restitution in Federal Criminal Cases*

Step One:

Determine whether restitution is discretionary or mandatory.

Step Two:

Identify the victims of the offense of conviction.

Step Three:

Identify victims' harms caused by the offense of conviction.

Step Four:

Determine which harms (and/or costs) are statutorily compensable as restitution.

Step Five:

Determine if the plea agreement broadens restitution.

Step One: Determine Whether Restitution is Mandatory or Discretionary

I. Mandatory Restitution

Court must impose full restitution for harm caused to identifiable victims of the offense, without consideration of defendant's ability to pay.

A. Full restitution mandated for offenses listed in § 3663A(c)

Crimes of violence (as defined in 18 U.S.C. § 16)
Tampering with consumer products (18 U.S.C. § 1365) and
All property offenses under title 18.

Exception for property offenses, only: If number of identifiable victims so large that restitution is impracticable, or complex factual issues would complicate or prolong sentencing and outweigh need to impose restitution (§ 3663A(c)(3))

B. Full restitution mandated for certain title 18 provisions:

Sexual abuse (§§ 2241-2245; restitution at § 2248)
Sexual exploitation of children (§§ 2251-2258; restitution at § 2259)
Domestic violence (§§ 2261-2262; restitution at § 2264)
Telemarketing fraud (§§ 1028-1029 and §§ 1341-1345; restitution at § 2327)
Child Support Recovery Act (§ 228)

II. Discretionary Restitution

Court must balance harm to the identifiable victims caused by the offense with the defendant's financial resources - § 3663(a)(1)(B)(i). *Exception:* complication or prolongation of sentencing - § 3663(a)(1)(B)(ii).

A. Court "may" impose restitution for the following (not covered by § 3663A):

All other title 18 offenses;
Drug offenses with or without identifiable victims; and
Air piracy (title 49)

B. "May" impose restitution for any other offense - only as a condition of supervision - §§ 3563(b)(2), 3583(d); must otherwise conform to criteria in §§ 3663, 3664.

III. Restitution Under the Sentencing Guidelines

Required if there is an identifiable victim of the offense. §5E1.1:

- Court "shall" impose restitution for the full amount of the victim's loss, if such order is authorized under the VWPA and certain enumerated title 18 offenses. §5E1.1(a)(1).
- For any other offense with an identifiable victim the court "shall" impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss. §5E1.1(a)(2).

Statement of Reasons - requires explanation if less than full restitution is imposed.

Step Two: Identify Victims of the Offense of Conviction

Under Federal Restitution Statutes:
Restitution Victims Must be Victims Harmed by Conduct of the Offense of Conviction

Statutory language:

"*For purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered...*" § 3663A(a)(2) and § 3663(a)(2).

"*...including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, a victim is a person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.*" § 3663A(a)(2) and § 3663(a)(2).

"*...losses suffered by the victim as a proximate result of the offense.*" Title 18 special restitution statutes (§§ 2248, 2259, 2264, and 2327).

Case Law on Identifying Victims

Courts Define Scope of Offense Narrowly for Identifying Victims for Restitution Purposes:

***Possession* of stolen credit cards** (18 U.S.C. § 1029(a)(3)): Court *cannot* award restitution to victims of the use of the cards: U.S. v. Hayes, 32 F.3d 171 (5th Cir. 1994); U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996); U.S. v. Cobbs, 967 F.2d 1555 (11th Cir. 1992). But cf., U.S. v. Moore, 127 F.3d 635 (7th Cir. 1997) (using plain error standard)

***Use* of stolen credit cards** (18 U.S.C. § 1029(a)(1)): Court *can* award restitution to victims of the use of the cards; but *cannot* award restitution to victims of theft of the cards: U.S. v. Blake, 81 F.3d 498 (4th Cir. 1996); explained in U.S. v. Sadler (unpub.), 1998 WL 613821 (4th Cir.).

Felon-in-possession of a firearm (18 U.S.C. § 922(g)): Court *cannot* award restitution to individual shot by the defendant with the gun: U.S. v. McArthur, 108 F.3d 1350 (11th Cir. 1997) (defendant acquitted of 924(c) charge). But cf., for guideline calculations, shooting victim can be vulnerable victim of relevant conduct for felon in possession offense: U.S. v. Kuban, 94 F.3d 971 (5th Cir. 1996).

Perjury before grand jury: Court *cannot* award restitution to victim of fraud, even though perjury was about the fraud: U.S. v. Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995).

Circuit Split on How to Apply Conspiracy, Scheme, or Pattern of Criminal Activity Provision:

Only when it is an express element of the offense of conviction.
1) See, e.g., U.S. v. Blake, 81 F.3d 498 (4th Cir. 1996); explained in U.S. v. Sadler (unpub.), 1998 WL 613821 (4th Cir.).

Can also apply when scope of facts in indictment or at trial indicate scheme, pattern:
2) See, e.g., U.S. v. Jackson, 155 F.3d 942 (8th Cir. 1998); U.S. v. Manzer, 69 F.3d 222, 230 (8th Cir. 1995); U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir.), cert denied, 115 S.Ct. 641 (1994).

Step Three: Identify Victims' Harms Caused by the Offense of Conviction

Harm Must Be Caused by the Offense of Conviction:

Statutory language:
- *"directly and proximately"* harmed (§§ 3663A, 3663)
- *"directly"* harmed (conspiracies, schemes, and patterns (§§ 3663A and 3663)
- harmed as a *"proximate result* of the offense" (special restitution statutes in title 18)

No statutory definition; no cases yet; legislative history says need clear "causal link" to offense conduct; "direct" can mean in direct chain of events begun by defendant's acts (i.e., no intervening causes); "proximate"can limit harm to reasonably foreseeable harm, or expand harm to include natural consequences of acts (most probable)

Case Law on Causation

No restitution to government for chemical disposal or to landlord for apartment cleaning, after defendant's meth lab explosion; only for costs that were not routine costs of doing business, directly caused by the offense. U.S. v. Menza, 137 F.3d 533 (7th Cir. 1998).

No restitution to government for "buy money" because it is routine cost of prosecuting case. See, e.g., U.S. v. Cottman, 142 F.3d 160 (3d Cir. 1998).

Restitution upheld for victim's legal costs incurred prior to defendant's interstate travel to violate protection order. U.S. v. Hayes, 135 F.3d 133 (2d Cir. 1998). (Result in this case partly due to language of special restitution statute; also, restitution could cover time period outside of offense conduct because of congressional amendment to reimburse victims' costs during the investigation and prosecution of the case as restitution.)

No restitution for car loan debt that was financed with tax fraud proceeds, because loan not a "harm" from the fraud, but merely a use of the proceeds. U.S. v. Riley, 143 F.3d 1289 (9th Cir. 1998).

No restitution to patient of doctor convicted of filing false insurance claims, where patient became addicted to drugs and lost job during doctor's scheme, because addiction was not caused by the false claims. U.S. v. Kones, 77 F.3d 66 (3d Cir. 1996), cert denied, 117 S.Ct. 172.

Restitution by police chief convicted of bribery upheld to city for one of chief's four-years of salary, to represent portion of his services that were illegitimate. U.S. v. Sapoznik, 161 F.3d 117 (7th Cir. 1998).

Step Four: Determine Which Harms (and/or Costs) Are Statutorily Compensable

I. Harms authorized for Restitution by 18 U.S.C. §§ 3663A(b) or 3663(b)

A. Which of the harms to the victims caused by the offense are statutorily compensable as restitution?

In offense resulting in damage to, loss, or destruction of victim's property --
Return of the property to the victim or designee or, if not possible,
Pay greater of value of property on date of damage, loss, or destruction, or on date of sentencing - less the value (as of the date the property is returned). §§ 3663A(b)(1); 3663(b)(1).

In offense resulting in bodily injury to a victim --
Pay cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including non-medical care and treatment recognized by the law of the place of treatment; and necessary physical and occupational therapy and rehabilitation; and income lost by the victim as a result of the offense. §§ 3663A(b)(2); 3663(b)(2).

In offense resulting in bodily injury and death of a victim --
Pay cost of necessary funeral and related services. §§ 3663A(b)(3); 3663(b)(3).

B. What additional costs to the victim are compensable as restitution?

In any case --
Pay victim for lost income, necessary child care, transportation, and other expenses related to participation in the investigation and prosecution of the offense or attendance at proceedings related to the offense. § 3663A(b)(4); 3663(b)(4).

II. Harms/Costs Authorized for Restitution by Special Restitution Statutes:

The defendant shall pay the "*full amount of the victim's losses*" (§§2327, 2248, 2259, and 2264) which includes:

"*all losses suffered by the victim as a proximate result of the offense.*"
(18 U.S.C. §§ 2327(2),(3), telemarketing); or

"*any costs incurred by the victim for --*
(A) medical services, relating to physical, psychiatric, or psychological care;
(B) physical and occupational therapy or rehabilitation;
(C) necessary transportation, temporary housing, and child care expenses;
(D) lost income; (E) attorneys' fees, as well as other costs incurred; and
(F) any other losses suffered by the victim as a proximate result of the offense"
(18 U.S.C. §§ 2248(3), 2259(3), and 2264(3), sexual abuse of a minor, sexual exploitation of children; and domestic violence).

Case Law on Compensable Harms/Costs

Restitution upheld for attorney's fees for victim bank, because not limited to listed harms without physical or property injury. U.S. v. Akbani, 151 F.3d 774 (8th Cir. 1998)

Restitution upheld for loss of income and psychological counseling to mother of kidnap victim (mother's physical "injuries" of nausea, bronchitis, and eye infections caused by trauma of event). U.S. v. Haggard, 41 F.3d 1320 (9th Cir. 1994). But more typically, no restitution allowed for psychological counseling for employees in buildings bombed by defendant, without bodily injury. U.S. v. Hicks, 997 F.2d 594, 601 (9th Cir. 1993).

Restitution upheld for cost of victim's air fare to visit her family as "nonmedical care and treatment" for the victim's trauma resulting from assault with intent to rape. U.S. v. Keith, 754 F.2d 1388, 1393 (9th Cir.), cert denied, 474 U.S. 829 (1985).

Restitution upheld for FBI's costs in relocating victim, as would have been compensable as expenses participating in the prosecution and investigation if the defendant had borne his own costs, and because restitution statute allows restitution to third parties who compensate victims. U.S. v. Malpeso, 126 F.3d 92 (2d Cir. 1997).

Restitution Compared to Relevant Conduct

I. The *Offense of Conviction* for Identifying Restitution *Victims* is Often *Narrower* Than the *Relevant Conduct* for the Offense

- Purpose of Relevant Conduct is to account for *culpability* of defendant and *harm or potential harm* from the offense. Relevant Conduct includes:
  - acts in preparation of the offense
  - acts in avoidance of detection of the offense
  - acts in same course of conduct or common scheme or plan as offense.
  - includes intended or attempted harms
  - includes gain
  - includes property that is recovered or returned

- Purpose of restitution is to *restore the victim* to his or her pre-offense condition Restitution includes:
  - actual, unrecovered loss to victims (and certain costs)
  - limited to offense of conviction (except where scheme, pattern, or conspiracy is an element of the offense of conviction).

II *Harms (and Costs)* That are *Compensable* as Restitution Are Sometimes *Broader* Than Harms Computed in *Relevant Conduct*

- If victim suffers physical injury, restitution is authorized for psychological counseling, medical or physical therapy or treatment, and funeral expenses if death resulted (18 U.S.C. § 3663(b) and § 3663A(b)).

- "In any case," transportation, child care, and other expenses involved in victims' participation in investigation and prosecution of case (18 U.S.C. §§ 3663(b) and 3663A(b)).

- Can sometimes be increased after sentencing (e.g., discovery of new losses pursuant to 18 U.S.C. § 3664(d)(5)).

- Some special restitution statutes allow compensation for "all harms" and some list more compensable harms than does the VWPA (18 U.S.C. §§ 2248, 2259, 2264, 2327)

- Key: Restitution award must be articulated as tied to, or pursuant to, some statutory language authorizing the award.

Step Five: Determine if the Plea Agreement Broadens Restitution

I. Statutory provisions that allow broader restitution to be imposed:

If the parties agree, pursuant to a plea agreement, the court can order,

a) Restitution in **any** criminal case **to the extent** agreed to by the parties in the plea agreement (§ 3663(a)(3));

b) Restitution to persons **other than the victim of the offense** (§§ 3663A(a)(3) and 3663(a)(1)(A)); and

c) **Mandatory restitution for non-qualifying offense**, if the parties agree that the plea agreement resulted from a qualifying offense (§ 3663A(c)(2)).

II. Application of above provisions:

General "agreements" or "understandings" are ineffective.

For example, provisions stating that -
the defendant knows the court can impose, restitution, or
the defendant knows the government will ask for restitution, or
the defendant "agrees to pay full restitution" for the offense,
are meaningless, and do not authorize the court to impose any more restitution than would otherwise be authorized for the offense of conviction.

Agreement must be a specific, binding agreement between the parties.

III. Statutory directive to the government:

The MVRA added a commentary note to 18 U.S.C. § 3551 providing that the Attorney General shall ensure that, *"in all plea agreements . . . consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded."*

C. "Community Restitution"

18 U.S.C. § 3663(c) and U.S.S.G. §5E1.1(d)

- Applies only to certain Title 21 offenses (does not include § 846) - § 3663(c)(1)
- Applies only if there is no identifiable victim - § 3663(c)(2)(A)
- Effective for offenses on or after November 1, 1997 - § 3663(c)(2)(A)
- May not exceed the fine imposed - § 3663(c)(2)(B)
- Penalty assessment and fine take precedence - § 3663(c)(5)
- May not interfere with forfeiture - § 3663(c)(4)
- Statute: the court "may" order community restitution - § 3663(c)(1)

  Guideline: the court "shall" order community restitution - §5E1.1(d)
  [But: It is a "departure" to not impose only where defendant has some additional ability to pay, after special assessments, other restitution (if any), and the minimum of the fine range is imposed - because fine takes precedence over this kind of "restitution."]

- Clerk receives and distributes payments:
  65% to state crime victim agencies;
  35% to state substance abuse block grant - § 3663(c)(3)(A) & (B)

D. Sequence for Imposition/Collection of Financial Payments

I. Order of Imposition at Sentencing

- **Special assessments** (for all offenses, pursuant to § 3013)

- **Restitution** (If discretionary, to extent of defendant's ability to pay):
  a) private victims (individual and corporate) - first
  b) providers of compensation to private victims - second
  c) government as victim - last

- **Fine** - Within fine range, to extent of defendant's ability to pay

- **"Community restitution"**:
  For certain offenses, pursuant to § 3663(c)
  If defendant still has ability to pay, after imposition of above

- **Other penalties, costs**

II. Order of Collection

- Same as above
- Payments applied in sequence of - principal, costs, interest, and penalties (§ 3612(i))
- Options upon default of payment listed at § 3613A

III. Statutory Basis for Above Sequences:

§ 3612(c): general order of payments is: penalty assessment, restitution to all victims, all other fines, penalties, costs

§ 3663(c)(5): "notwithstanding § 3612(c)," a penalty assessment or a fine takes precedence over "community restitution"

§ 3663(c)(2)(B): "community restitution" cannot exceed "the amount of the fine ordered for the offense charged in the case"

§ 3664(i): restitution is paid to all other victims before paid to government as victim

§ 3664(j)(1): restitution paid to victims before paid to a provider of compensation

E. Manner of Imposition of Restitution

I. **Statutory directives:** Section 3664(f)(2) - court determines the method of payment pursuant to § 3572 - which lists numerous methods of payment, and indicates preference for payment in full.

II. **Imposition in Full Amount (§ 3664(f)(1)):**

In all but the Second Circuit, court can impose restitution in full amount.*

Administrative Office, Office of General Counsel recommends imposition of full amount (see discussion in U.S. v. Ahmad, 2 F.3d 245 (7th Cir. 1993); and "Looking at the Law," Adair, *Federal Probation*, June 1994).

III. **Schedule of Payments:**

Can consider defendant's economic circumstances (§ 3664(f)(3)(A)) - even in mandatory restitution cases. Nominal or partial payment schedule possible (§ 3664(f)(3)(A); U.S. v. Golino, 956 F.Supp. 359 (E.D.N.Y. 1997), Weinstein, J.).

Only Ninth and Eleventh Circuits allow court to expressly order payment according to a schedule to be set by the probation officer.** Other courts oppose such orders.***

– But supervision cannot be revoked unless the court finds the defendant is willfully failing to pay a fine or restitution that he or she is capable of paying, regardless of who set the schedule.

– In all circuits, AO General Counsel advises that, as a practical matter, probation officers may use informal, working, supervision plans to effect collection during supervision; revocation proceedings can be sought only where there is a willful failure to pay what defendant is able to pay; court can be asked to set schedule, where helpful or necessary.

*US v. Mortimer, 52 F.3d 429, 436 (2d Cir. 1995). But see AO memorandum, March 5, 1998, "Imposition of Financial Penalties in the Second Circuit." Also, Judgment AO 245B (Rev. 8/96) changes "payable" to "due" immediately, which may make a difference in future Second Circuit cases.

**US v. Barany, 884 F.2d 1255, 1260 (9th Cir. 1989), cert. denied, 493 U.S. 1034; US v. Fuentes, 107 F.3d 1515, 1528-9, n. 25 (11th Cir. 1997). See also, US v. Lilly, 901 F.Supp. 25, 31-32 (D.Mass. 1995), aff'd, 80 F.3d 24 (1st Cir. 1996) (allowing PO to assess defendant's progress toward satisfaction of the restitution owing).

***See, e.g., US v. Graham, 72 F.3d 352, 356-7 (3d Cir. 1995), cert. denied, 116 S.Ct. 1286 (1996); US v. Porter, 41 F.3d 68, 71 (2d Cir. 1994); US v. Ahmad, 2 F.3d 245, 248-9 (7th Cir. 1993). Notes, but does not decide, issue: US v. Phillips, 139 F.3d 913 (10th Cir. 1998).

F. Relationship of Restitution to Supervision

I Restitution and fine are each separate components of the sentence, not part of the supervision component (as prior to 1982 under the FPA)

Restitution is "in addition" to rest of sentence (§ 3663(a)(1)(A))
Restitution is a final sentence (§ 3572(c))
Defendant is "sentenced" to pay a fine (§ 3571(a))

II Restitution automatically becomes condition of probation (§ 3563(a))

II Restitution survives supervision in most circuits

• Most courts have found that restitution survives supervision. See, e.g., U.S. v. Rostoff, 164 F.3d 63 (1st Cir. 1999); U.S. v. Berardini, 112 F.3d 606, 611 (2d Cir. 1997); U.S. v. Webb, 30 F.3d 687 (6th Cir. 1994); U.S. v. Eicke, 52 F.3d 165 (7th Cir. 1995); and U.S. v. Soderling, 970 F.2d 529, 535 & n. 12 (9th Cir. 1992). Restitution was collectible as a fine (which was collectible for 20 years after imprisonment).

• Some cases have been interpreted, in discussing (repealed) § 3663(f), to allow collection for only five years (see, U.S. v. Diamond, 969 F.2d 961, 969 (10th Cir. 1992); U.S. v. Joseph, 914 F.2d 780, 786 (6th Cir. 1990); U.S. v. Bruchey, 810 F.2d 456, 459-460 (4th Cir. 1987)), although it is likely that these courts were merely articulating the extent of the sentencing court's authority to collect the restitution or fine (see, e.g., Joseph, especially in view of Webb, supra).

• The MVRA repealed § 3663(f), and added provisions specifying that restitution is collectible by the government for 20 years after the defendant's imprisonment (§ 3664(m)(1)(A), and § 3613).

IV For any offense not listed in § 3663 or § 3663A, restitution may be imposed as a condition of supervision.

• Detriment: it expires when supervision ends.

• Caution: Still subject to same criteria of victims and harms as restitution under §§ 3663, 3664 (except for type of offense). E.g., U.S. v. Gall, 21 F.3d 107 (6th Cir. 1994); and U.S. v. Cottman, 142 F.3d 160 (3d Cir. 1998) (cannot impose restitution for "buy money" as condition of supervision because is not a loss caused by the offense, but routine cost of investigating cases). But see, U.S. v. Daddato, 996 F.2d 903 (7th Cir. 1993) (can order payment for buy money as specific (non-restitution) condition of supervision).

• Possible benefit: Court may be able to adjust the amount imposed, as a change of conditions, pursuant to Rule 32.1 F.R.Cr.P.

G. AO Reference Documents on Restitution

"Imposition of Restitution in Federal Criminal Cases," Goodwin, *Federal Probation*, December 1998, pp. 95-108 (discusses steps in determining victims and harms for restitution purposes).

April 16, 1998 memorandum: "Community Restitution Provision of the Mandatory Victims Restitution Act of 1996," Federal Corrections and Supervision Division.

February 18, 1998 memorandum: "Community Restitution Provisions of the Mandatory Victims Restitution Act of 1996," Federal Corrections and Supervision Division.

"When Do Various Provisions of the New Mandatory Restitution Act Apply?" Goodwin, *News & Views*, August 26, 1996.

May 31, 1996 memorandum: "Antiterrorism and Effective Death Penalty Act of 1996," Federal Corrections and Supervision Division.

September 1, 1995 memorandum: "Update to Probation Officers on the Imposition and Collection of Fines and Restitution," Federal Corrections and Supervision Division.

"Looking at the Law," Adair, *Federal Probation*, June, 1994, pp. 67-72 (discusses payment schedules, pp. 69-70).

"Recent Cases on Probation and Supervised Release," Adair, *Federal Probation*, December 1992, pp. 68-72 (discusses aftermath of Hughey and issues raised by 1990 VWPA amendments).

"Recent Supreme Court Decisions," Adair, *Federal Probation*, September 1990, pp. 66-71 (discusses implications of Supreme Court case of Hughey).

"Restitution - Ability to Pay," Adair, *Federal Probation*, May 1989, pp. 85-88 (discusses defendant's ability to pay, and whether restitution orders can be subsequently modified).

Recent, Related Articles:
"If you don't have a dime, who pays for the crime? - The Mandatory Victims Restitution Act," Tolvstad, D.O.J., *United States Attorneys' Bulletin*, January 1999, pp. 11-19 (discusses both imposition and collection of restitution under the MVRA).

"Criminal Restitution : An Advantageous Option for Victims," Levy, *Business Crimes Bulletin: Compliance and Litigation*, January 1999, pp. 2-4. (compares pros and cons of victims receiving criminal restitution vs. filing civil suits for damages).

D. Legal Discussion: Five Steps in Determining Victims and Harms for Restitution in Federal Criminal Cases[1]

I. The History of Restitution in Federal Criminal Cases

> *"The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being."*[2]

Putting this simple principle into practice in federal criminal cases is far easier to contemplate than to achieve. Despite the universally recognized benefits of restitution, a federal sentencing court has no inherent authority to order restitution. Rather, the court's authority stems purely from statutory sources. In fact, until 1982 restitution could not be imposed as a separate component of a federal criminal sentence, but only as a condition of probation pursuant to the Federal Probation Act of 1925 (FPA),[3] and was completely within the discretion of the court. By 1982, Congress wanted to give courts authority to impose restitution other than merely as a condition of probation,[4] and passed the Victim Witness Protection Act of 1982 (VWPA),[5] now codified at 18 U.S.C. §§ 3663-3664. The VWPA, as amended, is the primary statutory source for restitution as a separate component of a federal sentence. This is confirmed by the sentencing guidelines, which provide that the court is to "enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664."[6]

Thus, the VWPA ultimately determines the court's authority to issue a restitution order in a federal criminal case. The scope of this statutory restitution was clarified in 1990 in Hughey v. U.S., in which the Supreme Court held that the language of the VWPA, which authorizes courts

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[1]This is a shortened, modified version of "The Imposition of Restitution in Federal Criminal Cases," Goodwin, C., *Federal Probation*, December 1998.

[2]U.S. v. Webb, 30 F.3d 687, 689 (6th Cir. 1994) (citing legislative history of the VWPA, S.Rep. No. 532, 97th Cong., 2nd Sess. 1, 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2515, 2536 (emphasis added).

[3]Codified at 18 U.S.C. § 3651-3656, repealed November 1, 1987.

[4]Senate Judiciary Report for the VWPA: "As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our federal courts long ago. Under current law, 18 U.S.C. § 3651, the court may order restitution for actual damage or loss, but only as a part of a probationary sentence." S.Rep. No. 532, 97th Cong., 2nd Sess. 1 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2515.

[5]Pub. L. No. 97-291, 96 Stat. 1248 (1982), originally codified at §§ 3579, 3580.

[6]U.S.S.G. §5E1.1(a)(1).

to compensate victims "harmed as a result of the offense" (emphasis added),[7] limits restitution to "the loss caused by the specific conduct that is the basis of the offense of conviction."[8] Ever since the "Hughey limitation," however, Congress has steadily expanded restitution, and has recently made restitution mandatory in most cases.

In 1990, as a response to Hughey, Congress passed amendments to the VWPA[9] which slightly broadened restitution by expanding the scope of the offense for restitution purposes. The amendments did not, however, change the fact that restitution under the VWPA is limited to the offense of conviction. One 1990 amendment authorized courts to impose restitution to victims directly harmed by the defendant's criminal conduct within a scheme, conspiracy, or pattern of conduct, so long as the scheme, conspiracy, or pattern is an element of the offense of conviction.[10] Another 1990 amendment authorized the court to order restitution as agreed by the parties in the plea agreement.[11] When and how these amendments can be applied is still being litigated, to some extent.

In 1992, Congress enacted the first mandatory restitution provision, the Child Support Recovery Act (CSRA).[12] In 1994 it passed the Violence Against Women Act,[13] which added mandatory restitution for four specific offenses in title 18.[14] The VWPA was also amended to authorize reimbursement to victims for expenses involved in participating in the investigation and prosecution of the case.[15] Finally, on April 24, 1996, Congress significantly amended the VWPA by passing the Mandatory Victims Restitution Act of 1996 (MVRA).[16] The MVRA added § 3663A, which now requires mandatory restitution for certain offenses, such as crimes of violence and title 18 property offenses. The MVRA also expanded discretionary restitution by

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[7] § 3663A(a)(2). An identical provision was later added for mandatory restitution at § 3663A(a)(2).

[8] 495 U.S. 411, 413 (1990).

[9] Crime Control Act of 1990 (Pub. L. No. 101-647, 101 Stat. 4863, Nov. 29, 1990).

[10] § 3663(a)(2). An identical provision was later added for mandatory restitution at § 3663A(a)(2).

[11] §§ 3663(a)(3) and 3663(a)(1)(A). In 1996 § 3663A(3) (identical to § 3663(a)(3)) was added for mandatory restitution.

[12] Pub. L. No. 102-521, 106 Stat. 340 (1992), codified at 18 U.S.C. § 228. The Act mandated that courts impose restitution (of child support payments due) in all convictions of willful failure to pay past due child support.

[13] The Act was part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1904 (1994).

[14] Sexual abuse (§ 2241-2245; restitution at § 2248); sexual exploitation of children (§ 2251-2258; restitution at § 2259); domestic violence (§ 2261-2262; restitution at § 2264); and telemarketing fraud (§ 1028-1029 and § 1341-1345; restitution at § 2327).

[15] § 3663(b)(4). An identical provision was added in 1996 for mandatory restitution at § 3663A(b)(4).

[16] Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), effective April 24, 1996.

creating "community restitution" for victimless drug offenses in § 3663(c). The MVRA potentially broadened the definition of "victim" for both discretionary and (the new) mandatory restitution, by changing "victim of the offense" to "person directly and proximately harmed as a result of the commission of an offense."[17] It is not known yet whether courts will interpret "directly and proximately" as slightly expanding the imposition of restitution or not, but restitution will presumably still be limited primarily to the "offense" of conviction. Finally, the MVRA strengthened the imposition and enforcement provisions at § 3664 for all restitution orders.

Ex Post Facto Issues. After each amendment to the VWPA, the circuits split on whether the amendment could be applied to offenses committed prior to its enactment without violating the *ex post facto* clause of the U.S. Constitution.[18] This issue is no longer frequently encountered regarding earlier amendments, but it is currently being litigated regarding the MVRA. Our office and the Department of Justice have advised that the procedural portions of the MVRA are applicable, as indicated in the Act,[19] to convictions entered after its enactment. However, the substantive provisions -- those that cause the restitution amount to be higher or that convert discretionary to mandatory imposition -- are only applicable to offenses completed on or after the date of the Act (April 24, 1996). Most courts that have considered the issue have agreed that the substantive provisions of the MVRA are subject to *ex post facto* constraints.[20] Two of these have held, however, that where the conviction is of a "continuing" type of offense (e.g. fraud, conspiracy), and it continued past the date of the MVRA, mandatory restitution may be imposed for the pre-Act as well as post-Act conduct.[21] However, the Seventh Circuit has held that the *ex post facto* restriction does not apply to the MVRA, because restitution is not a criminal "penalty" but is compensation for the victim.[22] On the same rationale, the Eighth

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[17]See § 3663A(a)(2) for mandatory restitution, and § 3663(a)(2) for discretionary restitution. Everything about the MVRA indicates that Congress intended to expand restitution, but courts have not yet analyzed what effect, if any, these particular terms might have.

[18]This clause, at Article 1, § 9, clause 3, has been interpreted to prohibit the application of a law which increases the primary penalty for conduct after its commission.

[19]The MVRA states that it "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment" (April 24, 1996).

[20] U.S. v. Williams, 128 F.3d 1239 (8th Cir. 1997); U.S. v. Baggett, 125 F.3d 1319 (9th Cir. 1997); U.S. v. Siegel, 153 F.3d 1256 (11th Cir. 1998); U.S. v. Thompson, 113 F.3d 13, 15 n.1 (2d Cir. 1997) (in *dictum*); and U.S. v. Edwards, 162 F.3d 87 (3d Cir. 1998).

[21]Williams, supra. See also, U.S. v. Jackson, (unpub.) 149 F.3d 1185 (table), 1998 WL 344041 at 2 (6th Cir. (Ky.)). This rationale is consistent with that applied in similar situations, such as which version of the guidelines applies to the offense. See, e.g., U.S. v. Buckner, 9 F.3d 452, 454f (6th Cir. 1993).

[22]U.S. v. Newman, 144 F.3d 531 (7th Cir. 1998); U.S. v. Szarwark, 1999WL74694 (7th Cir.). See also the Sixth Circuit unpublished opinion, U.S. v. Ledford (unpub.) 127 F.3d 1103, 1997 WL 659673 (6th Cir. 1997) (holding that the MVRA is not subject to the *ex post facto* constraints because the same award could have been imposed as discretionary restitution, but may be case-specific).

Circuit held that repayment of child support under the CSRA (18 U.S.C. § 228) is not subject to *ex post facto* considerations.[23]

II The Determination of Victims and Compensable Harms for Restitution

Restitution requires a different analysis than other sentencing considerations under the guidelines, with which courts have more frequent experience. This, combined with the many changes to the restitution statutes, have lead to much litigation and numerous reversals of restitution orders.[24] Further, even though relatively few defendants have the financial resources to pay restitution,[25] restitution is now mandatory for nearly all federal cases in which there is an identifiable victim. Therefore, it is important that valid restitution orders be imposed and enforced, wherever possible, to comply with the law and to avoid unnecessary litigation.

To this end, this article suggests five steps that are useful in determining what restitution should and can be imposed. It is important that these steps be followed in sequence, particularly with regard to identifying victims *before* considering harms, in order to avoid considering harms to persons who are not victims of the offense of conviction. The process is one primarily of elimination, beginning with the scope of the offense of conviction as the outside limit for the identification of victims, with each step narrowing the focus, down to those harms (and some additional victims' costs) that are statutorily compensable as restitution.

A. *Step One*: Determine Whether Restitution is Mandatory or Discretionary

The first step is to determine whether restitution is mandatory or discretionary in any particular case, because there are significant differences between the two that impact on the determination of restitution. Restitution is mandatory for those kinds of offenses listed in § 3663A(c), in which an identifiable victim has suffered a physical injury or economic loss.[26] It

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[23]U.S. v. Crawford, 115 F.3d 1397, 1403 (8th Cir.), cert denied (1997).

[24]Interestingly, few if any courts have been reversed on appeal for not imposing restitution, which indicates courts' efforts to compensate victims of crime. Of the few cases to which the MVRA applies, there still have been no reversals of courts' failure to impose restitution.

[25]Both a fine and restitution are mandated by the guidelines, to the extent of a defendant's ability to pay. U.S.S.G. §§ 5E1.1 and 5E1.2. Yet, in FY 1997, both restitution and a fine were imposed in only 2.3% of federal cases, restitution only was imposed in 17.5%, and a fine only was imposed in 16.4%. Thus, in 63.9% of federal criminal cases there was no financial penalty imposed.

[26]§ 3663A(a)(1) provides that the court "shall" order restitution for those offenses listed in § 3663A(c), "notwithstanding any other provision of law..." The listed offenses are crimes of violence (defined in 18 U.S.C. § 16), title 18 property offenses, and tampering with consumer products (18 U.S.C. § 1365).

is also mandatory for a few specific title 18 offenses.[27] The vast majority of federal offenses with identifiable victims now require mandatory restitution. In all federal offenses, restitution can be discretionarily imposed as a condition of probation or supervised release.

Step Two: Identify the Victims of the Offense of Conviction

The government has the burden of proving what harm was suffered by the victims for restitution purposes by a preponderance of the evidence.[28] The court resolves any dispute as to the proper amount or type of restitution by a preponderance of the evidence.[29] The determination of restitution begins with the identification of the victims, to avoid including harm to persons other than to victims of the offense of conviction.

Scope of the Offense. The scope of the offense for restitution victims is narrower than for victims of relevant conduct, under the sentencing guidelines. Despite several legislative changes in the 1990's, the basic rule announced in Hughey v. U.S.,[30] that federal statutes only authorize restitution for victims of the offense of conviction, rather than to all persons harmed by relevant conduct of the offense, remains primarily intact. In fact, the rule could be said to have been fortified by the fact that Congress has chosen not to change the statutory terms that focus on the "offense of conviction" for restitution purposes.[31] Thus, the "loss caused by the conduct underlying the *offense of conviction* establishes the outer limits of a restitution order."[32] The primary issue is, then, what the scope of the offense is.

For example, a bank robbery is essentially taking property belonging to the bank from a person, by force or violence. It does not, however, include car theft that might have been committed in preparation for the robbery, although the car theft may be part of the robbery's relevant conduct, for guideline sentencing purposes.[33] Victims for restitution purposes are only

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[27]Sexual abuse (§§ 2241-2245, restitution at § 2248); sexual exploitation of children (§§ 2251-2258, restitution at § 2259); domestic violence (§§ 2261-2262, restitution at § 2264); and telemarketing fraud (§§ 1028-1029 and §§ 1341-1345, restitution at § 2327).

[28]§ 3664(e); U.S. v. Angelica, 951 F.2d 1007, 1010 (9th Cir. 1991).

[29]§ 3664(e).

[30]495 U.S. 411, 413 (1990).

[31]Noted in Gall v. US, 21 F.3d 107, 112 (6th Cir. 1994) (conc. op. by J. Jones). For both discretionary and mandatory restitution, a victim is a "person. . . harmed as a result of the offense." §§ 3663A(a)(2) and 3663(a)(2).

[32]U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir. 1994) (citing Hughey, supra, 495 U.S. at 420); see also, U.S. v. Baker, 25 F.3d 1452, 1457 (9th Cir. 1994).

[33]Note, however, that restitution can also sometimes be broader than relevant conduct. For example, restitution can include some compensable harms that are generally not computed in relevant conduct, such as costs of medical, psychological, or physical treatment or therapy and funeral expenses where there has been a physical injury or death, and victims' costs of participating in the investigation and prosecution of the case. Also, restitution can be

those who are harmed by the conduct of the actual offense of conviction. "The definition of victim provided in [the VWPA] is much narrower than the one in the guidelines, and it is § 3663 - not the guidelines - that governs the authority of a sentencing court to require restitution."[34] The guidelines define "offense" as "the offense of conviction and all relevant conduct under §1B1.3."[35] Relevant conduct includes acts committed in preparation for, or in avoidance of detection of, the offense, and foreseeable, jointly undertaken acts of others. Moreover, computation of "loss" in economic crimes for guideline sentencing can be based on such factors as "gain" to the defendant or "intended loss," but these concepts are generally not involved in computing restitution. However, one of these concepts, such as gain, might provide an accurate indication of the portion of the loss in a case that should be attributable to a particular defendant for restitution as well as loss purposes.[36] The essence of restitution is most comparable to unrecovered, "actual loss".[37] It's purpose is to restore the victim to the state the victim was in prior to the offense, not to act as a proxy for societal harm or risk, or the defendant's culpability, which are all functions of guideline computations of "loss" or "harm." Where courts mistakenly rely on relevant conduct to determine restitution, the restitution order is usually vacated on appeal.[38]

Appellate courts have continued the narrow interpretation of the statutory term "offense of conviction" the Supreme Court defined in Hughey, for identifying victims for restitution. Cases involving the use or possession of stolen or unauthorized credit cards illustrate the narrow focus on the offense of conviction for restitution purposes. In U.S. v. Cobbs,[39] the defendant was convicted of *possessing 89* unauthorized credit cards and of *using one* card, and the court imposed restitution for the *use* of *all* the cards. However, the Eleventh Circuit vacated the restitution order, holding that there was no loss from the conviction for possessing the cards; only the count of *using* the one card could support restitution. There have been similar cases in other

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increased after sentencing with the discovery of new losses, and some special restitution statutes (e.g., § 2264, domestic violence) allow compensation for "all harms," which might be even broader than relevant conduct. Finally, sometimes parties can agree to broader restitution than could otherwise be ordered, as discussed below.

[34]U.S. v. Blake, 81 F.3d 498, 506 n.5 (4th Cir. 1996) (J. Wilkins).

[35]U.S.S.G. §1B1.1, comment. (n.1(l)).

[36]See, e.g., U.S. v. Berardini, 112 F.3d 606 (2d Cir. 1997), where the telemarketing conspiracy caused $27 million loss, but, because the defendant gained $39,271 during his participation in the conspiracy, that figure was used (and agreed to) by the defendant for restitution purposes. The issue on appeal involved whether the court could impose restitution to yet-unlocated victims, as discussed below.

[37]See, e.g., U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996) (holding that while gain to a defendant is sufficient to show intent to defraud, the VWPA requires a real or actual loss to the victim); U.S. v. Badaracco, 954 F.2d 928 (3d Cir. 1992).

[38]See, e.g., U.S. v. Stoddard, 150 F.3d 1140 (9th Cir. 1998); U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996).

[39]967 F.2d 1555 (11th Cir. 1992).

circuits, as well, involving credit cards. In U.S. v. Hayes,[40] the defendant was convicted of possessing stolen mail (credit cards), and a restitution order for use of the cards was vacated. The Fifth Circuit in dicta said one factor it considered was that the offense of conviction (possession) did not include the dates on which the card was used, implying that if the use-dates had been included, the court may have reached a different result.[41]

The same narrow scope of the offense applies, whether the case involves firearms or perjury. For example, in U.S. v. McArthur,[42] the defendant shot someone coming out of a bar. He was eventually acquitted of a § 924(c) charge, but convicted of illegally possessing a firearm, and the court ordered restitution for medical costs to the victim of the shooting. However, the Eleventh Circuit vacated the order, holding that there could be no victim of a possession offense.[43] In U.S. v. Broughton-Jones,[44] where the defendant was convicted of lying to the grand jury about a fraud transaction, the Fourth Circuit rejected the government's argument that the fraud conduct was inextricably intertwined with the perjury conviction, and vacated a restitution order to the fraud victim. The court noted that, while it is conceivable for there to be a victim of perjury (such as where the perjury had the effect of delaying government efforts to recover stolen or defrauded money), in Broughton the fraud victim was not a victim of the perjury.[45]

Another Fourth Circuit case, U.S. v. Blake,[46] provides an excellent illustration of the difference between victims for guideline sentencing and victims for restitution. The defendant was convicted of using stolen credit cards, and he admitted he had targeted elderly women in order to take their purses and use their cards. The sentencing court imposed the vulnerable victim guideline enhancement, and ordered restitution for both the use of the cards and the cost to the elderly women for replacing their purses and wallets. The defendant appealed, claiming the elderly women were not victims for either guideline or restitution purposes. The Fourth Circuit upheld the vulnerable victim enhancement, because the guidelines broadly define an offense as "an offense of conviction and all relevant conduct,"[47] which includes conduct "in preparation" for the offense, such as targeting the elderly women. However, the court held that

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[40]32 F.3d 171 (5th Cir. 1994). See also, U.S. v. Jimenez, 77 F.3d 95 (5th Cir. 1996).

[41]Id. At 172-3. (The 1990 scheme/conspiracy provision was not discussed.)

[42]108 F.3d 1350 (11th Cir. 1997).

[43]While the court may have been reluctant to consider the shooting because of the acquittal, the McArthur result contrasts directly with that in U.S. v. Kuban, 94 F.3d 971 (5th Cir. 1996), where the shooting victims was found to be a victim of an offense of felon in possession of a firearm, for the purposes of the guideline vulnerable victim enhancement.

[44]71 F.3d 1143 (4th Cir. 1995).

[45]Id. at 1149 and n.3.

[46]81 F.3d 498 (4th Cir. 1996).

[47]U.S.S.G. §1B1.1, citing §1B1.3.

the restitution statutes do not authorize restitution for the cost of the women's purses and wallets, even though the court believed the result to be "poor sentencing policy," because the elderly women were not "victims" of the offense of "using" the credit cards, for restitution purposes.[48]

Who Can Be a Victim? The VWPA refers to victims as "persons." "Person" is defined in the federal code to "include ... unless the context indicates otherwise ... corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals,"[49] and restitution has frequently been ordered to be paid to these kinds of entities as victims of federal offenses.[50] The government is not mentioned in the code definition, but the context of the VWPA indicates the government can be a victim. For example, the statute directs that the government receives payment when it is a victim after individual victims are paid.[51] Government agencies have frequently been awarded restitution as victims in criminal cases.[52]

Victims may receive restitution even if not named in the indictment, and even where other victims are so named. For example, the mother of a kidnapping victim could receive restitution for her lost wages.[53] The victim can be a successor in interest, such as a government agency that insured the victim bank's accounts.[54] The right to restitution can be assigned by the victim to another party, such as a secured creditor, who may have actually suffered the loss.[55] A

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[48]Id. at 506. Some courts, sometimes using a heightened "plain error" standard, due to a lack of objection at sentencing, have allowed restitution to victims apparently beyond the offense. See, e.g., U.S. v. Moore, 127 F.3d 635 (7th Cir. 1997), in which the defendant was convicted of possession of unauthorized or counterfeit credit cards, and a restitution order to vendors for the use of the cards was upheld. Other courts have focused on whether the evidence portrayed a pattern or scheme, as discussed below. See, e.g., U.S. v. Jackson, 155 F.3d 942 (8th Cir. 1998), discussed below.

[49]1 U.S.C. § 1.

[50]The following courts are among those that have refuted early claims that restitution under the VWPA could not be awarded to entities other than individuals: U.S. v. Kirkland, 853 F.2d 1243 (5th Cir. 1988); U.S. v. Youpee, 836 F.2d 1181 (9th Cir. 1988); U.S. v. Dudley, 739 F.2d 175 (4th Cir. 1984).

[51]§ 3664(i).

[52]See, e.g., U.S. v. Malpeso, 115 F.3d 155 (2d Cir. 1997); U.S. v. Reese, 998 F.2d 1275 (5th Cir. 1993); Ratliff v. U.S., 999 F.2d 1023 (6th Cir. 1993); U.S. v. Daddato, 996 F.2d 903 (7th Cir. 1993); U.S. v. Jackson, 982 F.2d 1279 (9th Cir. 1992) (IRS); U.S. v. Ruffen, 780 F.2d 1493 (9th Cir. 1986), cert denied, 479 U.S. 963; U.S. v. Helmsley, 941 F.2d 71 (2d Cir. 1991) (IRS); and U.S. v. Burger, 964 F.2d 1065, 1071 (10th Cir. 1992) (FDIC and RTC).

[53]In U.S. v. Haggard, 41 F.3d 1320 (9th Cir. 1994), the court noted that nothing in the VWPA restricts the availability of restitution to the victim specified in the offense of conviction, and that in a case such as this, "in which a defendant deliberately targets an unsuspecting family as the victim of his crimes, the defendant may be held to answer for the family's loss of income" in keeping with the Hughey rule that the loss must have been caused by the offense of conviction. Id. at 1329 and n.6.

[54]U.S. v. Smith, 944 F.2d 618 (9th Cir. 1991), cert denied, 503 U.S. 951.

[55]In U.S. v. Berman, 21 F.3d 753 (7th Cir. 1994), a government agency was a secured creditor of the direct victim organization. The court found that a victim can assign the right of restitution to anyone he or she wants. Id. at 758.

victim cannot waive restitution, because restitution is not solely a right of the victim. There can be more than one victim of an offense, and sometimes one victim suffers direct harms, while another suffers more indirect harms, from the offense. For example, when a company pays bonuses to its employees based on a defendant's submission of false financial statements to a bank, the bank *and* the company are both victims of the offense.[56]

A court may order restitution to a third party that compensates the victim for loss caused by the defendant.[57] Where the victim receives compensation from a third party in a civil suit or otherwise, the victim is not paid twice. Rather, the defendant is ordered to pay the third party who compensated the victim for the harm caused by the offense, after all other victims are paid.[58] Restitution generally is not limited even by a civil suit or settlement agreement between the defendant and the victim, because of the possibility that such suits or agreements do not cover the same harms and costs as restitution, and because they can and are often subsequently changed, appealed, or amended.[59] If the defendant alleges that the settlement is for the same harm as the restitution, the defendant has the burden of establishing any offset from restitution that the victim received in a civil suit for the "same loss" that is the subject of restitution.[60]

Conspiracies and Schemes. One of the 1990 amendments to the VWPA expanded the definition of victim, i.e., the scope of the offense of conviction, to include, *"in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern."*[61] This was passed as a response to the Hughey decision, to ensure the "offense" included such conduct. There are some persistent issues regarding the application of this amendment. For example, some courts have enforced the statutory language that the scheme, pattern, or conspiracy must be an "element" of the offense of conviction.[62] However, the term "pattern" more aptly describes a series of acts, rather than an "element" of an offense, which may partly explain why some courts describe the 1990 "scheme" amendment as allowing the court to "look to the *scope of the indictment* in order to determine whether it *details a broad*

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[56]Kok v. U.S., 17 F.3d 247 (8th Cir. 1994).

[57]In U.S. v. Koonce, 991 F.2d 693 (11th Cir. 1993), a restitution order was upheld to a business forced to reimburse the post office for stolen money orders. See also, U.S. v. Malpeso, 126 F.3d 92 (2d Cir. 1997), where the FBI was compensated for providing witness protection and transportation expenses to the victim, as a third party provider.

[58]§§ 3664(j)(1) and (2).

[59]U.S. v. Cloud, 872 F.2d 846 (9th Cir. 1989), cert denied, 493 U.S. 1002 (civil settlement between the victim and the defendant does not limit restitution); U.S. v. Savoie, 985 F.2d 612 (1st Cir. 1993).

[60]In U.S. v. Crawford, 162 F.3d 550 (9th Cir. 1998), the defendant failed to prove the civil suit award was intended to cover funeral expenses, for which restitution was ordered.

[61]§ 3663(a)(2). An identical provision was later provided for mandatory restitution at § 3663A(a)(2).

[62]See, e.g., U.S. v. Blake, 81 F.3d 498, 506 n.5 (4th Cir. 1996); (further explained in U.S. v. Sadler (unpub.), 1998 WL 613821.

scheme encompassing transactions beyond those alleged in the counts of conviction."[63]

Another issue involves the fact that the statute authorizes restitution for "*the defendant's* criminal conduct in the course of the scheme, conspiracy, or pattern."[64] While courts have not generally focused on this point, courts uphold restitution that goes to acts by other participants within the scheme or conspiracy. However, it could be assumed, although it has not been specifically established, that restitution would only include the conduct of others that was foreseeable to, or jointly undertaken by, the defendant - consistent with jointly undertaken "reasonably foreseeable" criminal conduct for relevant conduct purposes.[65] This is an issue that has not been clarified.

It is clear, however, that the court must make an individualized determination for each defendant in a scheme or conspiracy, just as it must do for determining the drug amounts, per defendant, within a conspiracy for mandatory minimum purposes.[66] For example, in U.S. v. Neal,[67] where the defendant was convicted only of accessory after the fact, but received the same (full) restitution order as all other defendants, the First Circuit vacated the order because there was no basis in the record to determine if the defendant was responsible for the total loss caused by the conspiracy or not. Even though restitution is not automatically less for a defendant convicted of accessory after the fact,[68] it may be, and the court must consider restitution as it pertains to each defendant's conduct in the offense of conviction.

Other issues include: 1) the harm for which restitution is imposed must have been caused by conduct that was part of the *same* scheme or conspiracy as the offense of conviction,[69] and 2) restitution can be imposed for harm caused by conduct committed in counts which were

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[63]U.S. v. Manzer, 69 F.3d 222, 230 (8th Cir. 1995)(emphasis added) (quoting U.S. v. Welsand, 23 F.3d 205,7 (8th Cir.), cert denied, 115 S.Ct. 641 (1994). In Manzer, the defendant was ordered to pay restitution for 270 cloned cable TV units, although he was convicted of only a few in the count of conviction. See also, U.S. v. Jackson, 155 F.3d 942 (8th Cir. 1998), where the offenses of conviction included conspiracy to possess and utter unauthorized securities (checks), and possession of unauthorized credit cards and identification documents, but a restitution award to persons from whom purses and identification documents were stolen was upheld (a result contrary to that of Blake, Hayes, and Cobbs, supra), because the court found the *evidence at trial* proved that theft of the documents and cards was "in furtherance" of a check writing scheme, organized and run by the defendant.

[64]§§ 3663(a)(2) and 3663A(a)(2) (emphasis added).

[65]U.S.S.G. §1B1.3(a)(1)(B).

[66]See "Determining Mandatory Minimum Penalties in Drug Conspiracy Cases," Goodwin, *Federal Probation*, Goodwin, March 1995, pp. 74-78, and cases cited therein.

[67]36 F.3d 1190, 1199 (1st Cir. 1994).

[68]U.S. v. Baker, 25 F.3d 1452, 1456 n.5 (9th Cir. 1994).

[69]In U.S. v. Ledesma, 60 F.3d 750, 751 (11th Cir. 1995), the defendant was convicted of conspiring to export two stolen cars, and the sentencing court had imposed restitution to be paid to the owners of the stolen cars. The appellate court held that the exportation was not part of the same conspiracy as the vehicle theft.

acquitted, but only if the conduct was clearly part of the scheme, pattern, or conspiracy for which there was a conviction.[70]

In sum, the "scheme, pattern, and conspiracy" provision "expands" the offense of conviction for restitution purposes. Where it applies, it enables the court to identify restitution victims (and thus harms) more broadly than it could otherwise. When applying the provision, however, the restitution award is most likely to be upheld if the sentencing court is careful to articulate how the conduct that caused the harm was part of a scheme, pattern, or conspiracy that is an element of the offense of conviction.

B. *Step Three*: Identify Victims' Harms That Were Caused by the Offense of Conviction

After having identified the victims of the offense for restitution purposes, the next step is to consider the harms suffered by those victims "as a result of the offense of conviction." By first identifying victims of the offense, and then looking at the harm to those victims, one is less likely to include harm to victims of relevant conduct that may be outside the actual offense of conviction. Courts have been quite conservative in defining what harms were caused to the victims by the offense conduct, but the MVRA may have ultimately expanded the causation concept slightly, as discussed below.

Causation. The government has the burden of proving harm to the victim(s) by a preponderance of the evidence,[71] which includes proving that the victims' harm was caused by the offense of conviction. The statute simply authorizes restitution for the harm caused the victim *as a result of* the offense conduct. There is no causation standard specified. Few courts have focused attention on what the causation standard should be, or whether it has changed after the MVRA. The Seventh Circuit has observed that a pure "but for" standard sweeps too broadly for criminal responsibility, because it would include any downstream effects of an act, even if there were additional, intervening causes of the harm. This might result, for example, in holding a rapist responsible for harm to the hospitalized rape victim caused by a hospital fire.[72] The First Circuit has also concluded that the "but for" standard must be modified, for determining which losses to a bank were caused by the defendant's fraud, for restitution purposes:

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[70]For example, where some counts of bank fraud are acquitted, restitution may not be ordered for victims of those counts *if* the acquittal is interpreted to mean that the conspiracy did not include the acts charged in the acquitted counts. U.S. v. Kane, 944 F.2d 1406 (7th Cir. 1991). On the other hand, there is no blanket prohibition on imposing restitution for acquitted counts, and courts have imposed restitution for losses to victims associated with acquitted counts, particularly if the scheme or conspiracy of conviction encompasses activity that was not covered by the acquittal. U.S. v. Chaney, 964 F.2d 437 (5th Cir. 1992); U.S. v. Farkas, 935 F.2d 962 (8th Cir. 1991).

[71]§ 3664(e).

[72]U.S. v. Marlatt, 24 F.3d 1005 (7th Cir. 1994).

"We hold that a modified but for standard of causation is appropriate for restitution under the VWPA. . . . the government must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal nexus between the conduct and the loss is not too attenuated (either factually or temporally). The watchword is reasonableness. . . . what constitutes sufficient causation can only be determined case by case, in a fact-specific probe." [73]

While it may be difficult to define how close the connection must be between conduct and harm, courts have vacated restitution orders where the connection was not close enough. For example, in U.S. v. Riley, the Ninth Circuit held that a defendant convicted of tax fraud could not be ordered to pay restitution for the amount owed on an automobile loan for which he had used proceeds from the fraud.[74] And, in U.S. v. Kones, where a doctor defendant was convicted of filing false insurance claims, the Third Circuit held he could not be ordered to pay restitution to a patient who became addicted to painkillers and lost his job during the doctor's scheme - because the patient was not the victim of the offense, which was filing false insurance claims.[75]

The calculation of restitution sometimes involves some of the same issues as computation of "loss" for guideline sentencing, and can be as complicated. Just as loss must sometimes be estimated, such an estimation is sometimes the appropriate amount to be imposed as restitution, too. For example, in U.S. v. Sanga, the Ninth Circuit held that an illegal alien smuggled into the country by the defendant, forced to work as a maid under slave conditions, was entitled to restitution based on the difference between the minimal wages she earned and what she should have earned.[76] The Sixth Circuit upheld a restitution order of one year's salary to be paid to the city by a former Police Chief, convicted of taking bribes for four years in U.S. v. Sapoznik.[77] The Sixth Circuit held that a victim is entitled to the retail value, as opposed to actual cost, of goods which the defendant acquired by fraud and then sold (at retail prices).[78] And, the Tenth Circuit case of U.S. v. Diamond demonstrates how complex restitution computations can be where there are numerous, complex financial transactions, and illustrates that the government

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[73] U.S. v. Yaknin, 112 F.3d 579, 590 (1st Cir. 1997). The court rejected an "unbridled but for" causation standard for restitution. "While it is true that for want of a nail the kingdom reputedly was lost...it could hardly have been Congress' intent to place the entire burden on the blacksmith." Id. at 588. The defendant owed the victim bank for some loans not procured by fraud, but had paid some loans that had been procured by fraud. Restitution could only be ordered for outstanding fraudulent loans. See also, U.S. v. Campbell, 106 F.3d 64 (5th Cir. 1997) (bank repossessed collateral on defendant's fraudulent loan and got more for it than the value of the loan, but defendant had other, unpaid loans with the bank that were legitimate; no restitution could be imposed).

[74] 143 F.3d 1289 (9th Cir. 1998).

[75] 77 F.3d 66 (3d Cir. 1996), cert denied, 117 S.Ct. 172.

[76] 967 F.2d 1332 (9th Cir. 1992).

[77] 161 F.3d 117 (7th Cir. 1998).

[78] U.S. v. Lively, 20 F.3d 193 (6th Cir. 1994).

must be able to prove that the restitution loss resulted from the offense conduct itself, rather than related conduct which may have contributed to the loss.[79]

A rule of thumb is that restitution does not include *routine costs* to the victim. For example, in U.S. v. Menza,[80] the defendant was convicted of manufacturing methamphetamine after his homemade meth lab exploded, damaging his apartment. Even though the sentencing court ordered restitution for the cost to the government for disposing of various chemicals, and to the landlord for cleaning the apartment, the Seventh Circuit vacated the order and remanded for the court to determine which costs were directly caused by the meth lab offense, and which costs were routine, for both the landlord and for the government. Similarly, restitution orders for "buy money" (money given to defendants by the government in reverse stings) have been struck because such costs are viewed as routine costs in investigating and prosecuting cases (or the court holds that the government is not a "victim" harmed by the offense - which leads to the same result).[81] Likewise, restitution orders for victims' attorneys' and investigation fees have been invalidated as not "caused" by the offense.[82]

Another rule of thumb, that is helpful in determining those harms "caused" by the offense of conviction, is that restitution is intended to *restore* the victim to his or her condition prior to the offense. This perspective eliminates "losses" to the victim which, although perhaps consequentially "caused" by the offense, are secondary and more indirect. This analysis would, for example, support restitution for a victim's costs to replace a security camera damaged in a robbery, but not for costs for improving the security system after the robbery, even though the offense demonstrated the need for such improvements. The victim may claim that he or she would not have improved the system "but for" the robbery; however, this sort of connection is more indirect and is not "direct" or "proximate" (in the sense of foreseeable) in the same way repair of damage directly caused by the offense is. If, however, the most efficient or practical way to repair the system is to use new, updated parts (which have the effect of upgrading the system), then such repairs can be said to be necessary to *restore* the victim to its prior state (i.e. with a functioning security system).

Sometimes, where the fact-finding required to make such distinctions is tedious, such as where there are a few non-restitution costs mixed in with a large number of restitution costs or

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[79]U.S. v. Diamond, 969 F.2d 961 (10th Cir. 1992).

[80]137 F.3d 533 (7th Cir. 1998).

[81]U.S. v. Cottman, 142 F.3d 160 (3d Cir. 1998); U.S. v. Khawaja, 118 F.3d 1454 (11th Cir. 1997); U.S. v. Meachum, 27 F.3d 214 (6th Cir. 1994); U.S. v. Gall, 21 F.3d 107 (6th Cir. 1994); U.S. v. Gibbons, 25 F.3d 28 (1st Cir. 1994). But see, U.S. v. Daddato, 996 F.2d 903 (7th Cir. 1993), which would allow an order to reimburse the "buy money" not as restitution, but as a discretionary condition of supervision. See also, dissent in Cottman.

[82]U.S. v. Mullins, 971 F.2d 1138 (4th Cir. 1992); U.S. v. Diamond, 969 F.2d 961 (10th Cir. 1992). See also, U.S. v. Sablan, 92 F.3d 865, 870 (9th Cir. 1996) (no restitution for costs of victim bank meeting with FBI).

harms,[83] or when such fact-finding is extremely difficult,[84] some appellate courts have allowed restitution for all the costs or harms. Also, one should bear in mind that, where the offense occurred after the enactment of the 1994 amendment allowing restitution for victims' costs for participating in the investigation and prosecution of the case, discussed below, some seemingly indirect costs are included in restitution under that provision that would not otherwise be included.

The MVRA. In 1996, Congress passed the MVRA which added the words "directly and proximately" to describe how restitution victims are harmed by the offense of conviction.[85] While there have been no cases analyzing the effect of these terms, "proximately" invokes the legal concept of "proximate cause." In civil racketeering cases, in order to sue for treble damages, the plaintiff must prove that the defendant's conduct was a "proximate cause" of plaintiff's injury.[86] In contract and tort law this term often limits pure "but for" causation to include only harm for which the defendant's conduct was a "substantial factor" in causing, or which should have been "reasonably foreseeable" to the defendant. Nor is the concept of "foreseeability" unknown to criminal law. "Foreseeable" acts of others in jointly undertaken conduct are attributable to the defendant's relevant conduct under the sentencing guidelines.[87] Also, the Sentencing Commission has been considering and testing a reformed definition of "loss" for guideline purposes that contains a "foreseeability" concept.[88]

However, another concept associated with "proximate cause" has the potential of expanding restitution liability, at least slightly. One theory of tort "proximate cause" is that a defendant is responsible for the "natural consequences" of his or her acts - whether they were foreseeable, or not.[89] Pre-MVRA cases often did not allow restitution for harms not directly

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[83]See, U.S. v. Tencer, 107 F.3d 1120 (5th Cir. 1997) and U.S. v. Seligsohn, 981 F.2d 1418, 1421 (3d Cir. 1992).

[84]U.S. v. Davis, 60 F.3d 1479, 1485 (10th Cir. 1995).

[85]The victim is one who is "directly and proximately" harmed, or "directly" harmed by the defendant's conduct in the conspiracy, scheme, or pattern (§§ 3663A, 3663), or harmed as a "proximate result of the offense" (special title 18 mandatory restitution statutes, e.g., § 2327, telemarketing).

[86]Racketeer Influenced and Corrupt Organizations Act (RICO), provides for civil liability (18 U.S.C. § 1964) or criminal liability (18 U.S.C. § 1963). The RICO Act has the same causation requirement as the Clayton Act (15 U.S.C. § 15) for securities fraud cases. See, e.g., Beck v. Prupis, 162 F.3d 1090 (11th Cir. 1998) (defining "proximate cause" in the civil RICO context); Holmes v. Securities Investor Protection Corporation, 112 S.Ct. 1311, 1312 (1992).

[87]U.S.S.G. §1B1.3(a)(1)(B).

[88]See, "Coping With 'Loss': A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines," Bowman, 51 Vanderbilt L.Rev. 461 (1998), for influential discussion of the reasons behind the reform effort.

[89]The famous case of Palsgraf v. Long Island Restitution, Co., 162 N.E. 99 (N.Y. 1928), illustrates the two primary competing views of "proximate cause" in tort law. The majority opinion, written by Justice Cardozo, focuses on whether the harm was "foreseeable" to someone in the defendant's position, whereas the minority opinion, just as persuasively, argues that one should be responsible for the "natural consequences" of one's acts. States base their

caused by the defendant's conduct. For example, the portion of a restitution order for a bank fraud victim's costs of reconstructing bank statements and replacing stolen funds was vacated because it was not a direct harm of the offense conduct.[90] But future courts, applying a "proximate" harm standard, may interpret causation more broadly.

Indeed, it is most likely that the term "proximately" will ultimately be interpreted as slightly expanding the scope of restitution, consistent with the clear congressional intent behind the MVRA to maximize to the extent possible the imposition and enforcement of restitution. An expansive approach is also consistent with the 1994 VWPA amendment authorizing restitution for "indirect" costs, such as those to a victim for participating in the investigation and prosecution of a case, as discussed below. It is also consistent with the four special title 18 mandatory restitution statutes enacted in 1994, which require restitution for the "full amount of the victim's losses" or "all losses suffered by the victim as a proximate result of the offense."[91] Three of the four also include an extensive list of "indirect" harms, such as counseling and therapy services, temporary housing, lost income, and attorneys' fees,[92] which are broader than the listed harms in the VWPA that have not significantly changed since enacted in 1982. Future courts may rely on the spirit and letter of the 1994 and 1996 restitution legislation to breathe new life into the scope of the VWPA, regarding causation of harms for restitution purposes.

A slightly broader analysis is most likely to lead to different results in the "gray" areas where the determination of victims or causation of harms is a close call. (The same would apply to the compensation of harms, as discussed below.) Such "grey areas" might include, for example, the shooting victim in McArthur, supra, the credit card use-victims in cases like Hayes, supra, (especially where the date of possession includes the dates of use), or perhaps the elderly theft victims in a case like Blake, supra. Such an expansion may also support restitution for psychological counseling where the "injury" is less obvious, such as that in Haggard,[93] discussed below, or for "patterns" of conduct similar to, but not necessarily an element of, the offense of conviction. However, the interpretation of "proximate" has not yet been tested in the courts, and the VWPA language regarding "the offense," upon which Hughey was based, has remained substantially unchanged. Thus, any expansion in the identification of victims or harms will most likely be incremental.

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tort law on one or the other of these theories, to this day.

[90] U.S. v. Schinnel, 80 F.3d 1064, 1070 (5th Cir. 1996).

[91] 18 U.S.C. §§ 2248, 2259, 2264, 2327.

[92] 18 U.S.C. §§ 2248(3), 2259(3), and 2264(3).

[93] 41 F.3d 1320 (9th Cir. 1994).

C. *Step Four*: Identify Those Harms and Costs That are Statutorily Compensable as Restitution

Restitution is a statute-based penalty, and most courts have interpreted the compensable harms listed in the restitution statutes to be the only harms that can be compensated as restitution. Specific kinds of restitution are listed in the VWPA for cases in which there is "damage to or loss or destruction of property of a victim,"[94] or when there is "bodily injury to a victim."[95] For example, psychiatric and psychological care and lost income are only listed for where the victim suffers "bodily injury,"[96] and courts generally do not allow restitution for these costs unless there was clear physical, "bodily," injury.[97] Also, it should be noted that there is no authorized compensable restitution for "pain and suffering," which is a common damage award in civil suits.

However, some courts have shown a willingness to find statutory authorization to uphold restitution orders for harms caused to *bona fide* victims of the offense, and appellate courts are likely to uphold the courts' efforts to compensate victims - *so long as* the sentencing court is careful to tie the award to specific statutory language, either in the VWPA or a specific restitution statute. For example, in the early case of U.S. v. Keith,[98] the defendant was convicted of assault with intent to rape, and the victim suffered bodily injury. The VWPA allows compensation where there is bodily injury for costs for "nonmedical care and treatment."[99] The Ninth Circuit upheld a restitution order for the cost of the victim's air fare for a visit to her family, as "nonmedical care and treatment" for the victim's trauma, caused by the defendant's offense conduct.

Years later, the same court, in U.S. v. Hicks, praised the Keith order as an example of a sentencing court taking "pains to fit the restitution order into the language of the statute."[100] It

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[94] § 3663(b)(1) and § 3663A(b)(1).

[95] § 3663(b)(2) and § 3663A(b)(2).

[96] §§ 3663(b)(2), 3663A(b)(2). But note that the lists of specific compensable harms are broader in the special title 18 mandatory restitution statutes, such as §§ 2248(3), 2259(3), and 2264(3), and include such harms as compensable, even without "bodily injury."

[97] See, U.S. v. Husky, 924 F.2d 223 (11th Cir. 1991)(court could not order restitution to compensate the rape victim for pain and suffering; the list of compensable expenses in the VWPA is exclusive); U.S. v. Hicks, 997 F.2d 594 (9th Cir. 1993)(restitution could not include the cost of psychological counseling for IRS employees targeted by the defendant's bombings); U.S. v. Dryes, 73 F.3d 229 (9th Cir. 1995)(lost income could not be ordered as restitution where the victim did not suffer bodily injury).

[98] 754 F.2d 1388, 1393 (9th Cir.), cert denied, 474 U.S. 829 (1985).

[99] § 3663(b)(2)(A) includes "... nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment."

[100] 997 F.2d 594, 601 (9th Cir. 1993).

nonetheless vacated the restitution order in Hicks for psychological counseling for IRS employees who were in buildings bombed by the defendant (but who did not suffer bodily injury), because the restitution was not tied to a statutorily compensable harm.

Two other cases illustrate courts' willingness to uphold restitution for harms suffered by *bona fide* victims of an offense, if possible. In U.S. v. Haggard, the Ninth Circuit upheld a restitution order to compensate the mother of a kidnapping victim for lost income, even though it conceded the VWPA requires a bodily injury before psychological harm can be compensated.[101] The court also indicated (in *dicta)* that "physical injury" might include such "injuries" as nausea, bronchitis and a recurring eye infection, if suffered as a result of trauma from the defendant's conduct.[102] Recently, in U.S. v. Akbani,[103] the Eighth Circuit upheld a restitution order to a victim bank for attorneys' fees, reasoning that, although attorneys' fees are not listed as compensable unless there is damage to or loss of property, the court found no such limiting list applies where there is no loss of or damage to property. Also, "there is no blanket prohibition in the VWPA against inclusion of attorneys' fees."[104]

Congress made it easier to award what might otherwise be seen as "indirect" costs to victims in 1994 by enacting an amendment to the VWPA that reads, *"(4) in any case, [the court can] reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."*[105] Although restitution harms are primarily those that are directly caused by the offense, as discussed above, this provision allows compensation for some "indirect" harms, or "costs." The provision provides evidence of congressional intent to maximize restitution, and constitutes a useful analogy to courts trying to compensate victims within the applicable statutory language. For example, the Second Circuit recently relied on this provision in U.S. v. Malpeso[106] to uphold a restitution order to the FBI to cover costs in relocating a victim. The court reasoned that the 1994 amendment would have authorized restitution for the relocation costs if the victim had borne his own expenses, and the court could compensate the FBI for those expenses, especially in light of the fact that the statute also allows the court to order restitution to third parties who compensate victims harmed by the offense.[107]

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[101]41 F.3d 1320 (9th Cir. 1994).

[102]Id. at 1329 and n.7. A possible factor was the fact that the appellate court was using a "plain error" standard (because the defendant did not object to the restitution order at sentencing), which gives the sentencing court a greater benefit of the doubt in the analysis.)

[103]151 F.3d 774 (8th Cir. 1998).

[104]Id. at 779-780 (citing U.S. v. Marsh, 932 F.2d 710, 712 (8th Cir. 1991), quoting Hughey). The Akbani court was also using a "plain error" standard of review.

[105]§ 3663(b)(4). An identical provision was included in the MVRA for mandatory restitution at § 3663A(b)(4).

[106]126 F.3d 92 (2d Cir. 1997).

[107]§ 3664(f)(1)(B).

In U.S. v. Hayes,[108] the Second Circuit recently relied on several statutory provisions to uphold a restitution order. The defendant was convicted of crossing state lines in violation of a protective order, for which restitution is mandatory.[109] The Second Circuit used the provision authorizing restitution to a third party who compensates a victim for harms caused by the offense to uphold restitution for the victim's housing costs, even though the victim lived with her parents while fleeing the defendant. It also used the provision allowing victims' costs participating in the investigation of the case, and specific language in the special restitution statute involved to uphold other parts of the restitution order, including the victim's costs in obtaining a protective order, even though the defendant argued that the costs were incurred prior to the actual offense conduct, and thus could not have been "caused" by the offense conduct. The Second Circuit noted, however, that the special statute requires restitution for the "full amount of the victim's losses as determined by the court,"[110] and specifically mentions "costs incurred in obtaining a civil protection order" and "any other losses suffered by the victim as a proximate result of the offense."[111] Moreover, the fact the costs occurred outside the time frame of the actual offense conduct was not dispositive, because restitution is authorized for victims' costs incurred in the investigation and prosecution of the case, which occur *after* the offense conduct.

Finally, courts' willingness to compensate bona fide victims of offenses where possible may also be partly due to their longstanding familiarity with the FPA, which since 1925 simply authorized restitution (as a condition of probation) "for actual damages or loss caused by the offense for which conviction was had."[112] There was no potentially restricting list of specific compensable harms. Also, in conformity with judicial intent to maximize restitution where possible, in cases where the offense was committed between 1982 and 1987 - for which both the VWPA and the FPA were ostensibly available, courts regularly upheld restitution orders under *whichever* statutory authority provided the strongest support.

D. *Step Five*: Determine if Plea Agreement Allows Any Broader Restitution to be Imposed

After determining what restitution could lawfully be imposed in a case based on the principles discussed above, one must carefully review the plea agreement to determine if it

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[108] 135 F.3d 133 (2d Cir. 1998).

[109] §§ 2262 and 2264.

[110] § 2264(b)(1).

[111] §§ 2264(b)(3)(E) and (F). Also, like the other special title 18 mandatory restitution statutes (§§ 2248, 2259, and 2327), it cross-references the VWPA. Presumably, either could be used to support restitution orders, and they are not mutually exclusive, but rather are complementary to each other - consistent with Congress' clear intent to maximize restitution.

[112] 18 U.S.C. § § 3651, repealed. See U.S. v. Vance, 868 F.2d 1167, 1170 (10th Cir. 1989) (citing leading cases in each circuit on compensating harm under the FPA).

allows restitution to be imposed for a greater amount than would otherwise be authorized. This is because the VWPA, as modified by the MVRA, contains three provisions regarding plea agreements that allow expansion of restitution beyond what might otherwise be imposed. Two were enacted as part of the Crime Control Act of 1990.

Section 3663(a)(3) reads, *"The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement"*[113] (emphasis added). This provision allows the parties to agree to a restitution order that "overrides" other constraints on restitution in two ways. First, the court can impose restitution in any offense, if the parties agree, even if the offense is not one for which restitution would otherwise be statutorily authorized. This provision has been used to support restitution for offenses outside of title 18.[114] Second, the court can impose restitution to the extent to which the parties agree. For example, this provision was used to uphold a restitution order where the defendant agreed to pay restitution for losses from dismissed counts that might not otherwise have supported restitution.[115]

A second provision was added in 1990, § 3663(a)(1)(A), because prior to that time some courts had prohibited the imposition of restitution to victims outside the offense of conviction, even where the defendant agreed to the amount in a plea agreement.[116] Section 3663(a)(1)(A) reads, "The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense."[117] Finally, in 1996, § 3663A(c)(2) was added as part of the MVRA. It allows the court to impose mandatory restitution for an offense not listed in § 3663A, if the plea agreement specifically states that a mandatory restitution offense gave rise to the plea agreement.

Some cautions regarding plea agreements apply. Where the plea agreement merely states

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[113]There is no identical provision for mandatory restitution in § 3663A, perhaps because full restitution is presumed to be imposed in all such cases, anyway.

[114]See, e.g., U.S. v. Soderling, 970 F.2d 529, 534 (9th Cir. 1992), cert denied, 508 U.S. 952 (1993); U.S. v. Guthrie, 64 F.3d 1510, 1514 (10th Cir. 1995). Without such an agreement, restitution cannot be ordered under the VWPA, for example, for non-violent offenses not in title 18, such as title 12 equity skimming offenses. U.S. v. Aguirre, 926 F.2d 409 (5th Cir. 1991).

[115]U.S. v. Thompson, 39 F.3d 1103, 1105 (10th Cir. 1994).

[116]See discussion in 1997 Federal Sentencing Guidelines Handbook, Haines, editor, at p. 658; U.S. v. Guardino, 972 F.2d 682 (6th Cir. 1992); U.S. v. Soderling, 970 F.2d 529 (9th Cir. 1992).

[117]A similar provision, § 3663A(3), applies to mandatory restitution. The circuits disagreed whether the 1990 amendments could be applied to previously committed offenses. For example, in U.S. v. Silkowski, 32 F.3d 682 (2d Cir. 1994), the Second Circuit held a plea agreement was applicable where the defendant entered into the plea agreement after the 1990 amendment was enacted, even though a significant portion of the loss occurred as a result of conduct committed prior to the amendment. See also, U.S. v. Arnold, 947 F.2d 1236, 1237 (5th Cir. 1991). But see, U.S. v. Snider, 957 F.2d 703 (9th Cir. 1992). However, the amendments have been in place long enough now to be generally applicable to cases currently being sentenced.

that the government will ask the court for a certain amount of restitution, the provision will probably not be read as a specific agreement by the defendant to pay that amount.[118] Likewise, a simple statement of an understanding that the court may order restitution for any victim of the offense of conviction will not allow the court to impose any restitution beyond what could otherwise be imposed for that offense.[119] Nor will an oral acknowledgment by the defendant at the plea that he or she could be ordered to pay restitution be considered an "agreement" by the defendant to pay restitution, where the plea agreement is silent (and particularly where it contains an "integration clause," stating it constitutes the entire agreement between the parties).[120]

The general rule is that a restitution order will be upheld under these provisions so long as the agreements are specific.[121] The Ninth Circuit, in U.S. v. Soderling, cited an example of the level of specificity required: The defendant agrees "...to make restitution for the losses stemming from [the two offenses in the information] and from the other five transactions, all in return for the government's agreement not to prosecute [the defendant] for offenses arising out of the other five transactions."[122] Another example of a specific, effective agreement is that upheld by the Second Circuit in U.S. v. Rice, which provided that restitution need not be limited to the counts of conviction, and which had a separate rider that explained the scope and effect of the agreed upon restitution.[123]

One frustrated appellate court, after painstakingly analyzing the plea agreement and transcripts of the plea and sentencing, said "the government would be well advised to give greater consideration to the impact of the VWPA and Hughey in future plea negotiations where it seeks restitution of a specific amount from a defendant pursuant to a plea agreement."[124]

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[118]See discussion, for example, in U.S. v. Ramilo, 986 F.2d 333 (9th Cir. 1993); U.S. v. Baker, 25 F.3d 1452 (9th Cir. 1994); U.S. v. Soderling, 970 F.2d 529, 531 (9th Cir. 1992) (per curiam).

[119]U.S. v. Guthrie, 64 F.3d 1510 (10th Cir. 1995).

[120]U.S. v. Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995); U.S. v. Guthrie, 64 F.3d 1510 (10th Cir. 1995). Occasionally, where the plea agreement is general or where the amount of restitution is uncertain, a court is willing to examine transcripts of the plea and/or sentencing hearings to determine whether the parties actually agreed at those later stages to a specific sum of restitution. See U.S. v. Schrimsher, 58 F.3d 608, 610 (11th Cir. 1995); U.S. v. Silkowski, 32 f.3d 682, 689 (2d Cir. 1994); and U.S. v. Lavin, 27 F.3d 40, 42 (2d Cir. 1994). It is naturally much more preferable for the parties' to generate a clear agreement regarding the nature and extent of restitution.

[121]See, e.g., U.S. v. Barrett, 51 F.3d 86, 89 (7th Cir. 1995); U.S. v. Osborn, 58 F.3d 387, 388 (8th Cir. 1995)(restitution based on dismissed charges because of agreement); U.S. v. Soderling, 970 F.2d 529, 532-34 (9th Cir. 1992)(per curiam)(restitution upheld for losses outside of conviction); U.S. v. Thompson, 39 F.3d 1103, 1105 (10th Cir. 1994)(same); U.S. v. Schrimsher, 58 F.3d 608, 610 (11th Cir. 1995)(per curiam)(restitution for three stolen vehicles valid for offense involving only two, because of agreement).

[122]U.S. v. Soderling, 970 F.2d 529, 531 (9th Cir. 1992).

[123]U.S. v. Rice, 954 F.2d 40, 41 (2d Cir. 1992).

[124]Silkowski, supra, 32 F.3d at 689.

Congress, too, directed the government to seek full restitution. The MVRA added a note to § 3551, which states that the Attorney General shall ensure that *"in all plea agreements . . . consideration is given to requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually pleaded."* Nevertheless, plea agreements still often merely state that the defendant agrees to pay full restitution, which is ineffective and permits only that restitution to be imposed as could be otherwise, according to the principles involving victims and harms, discussed above.

III. Conclusion

The many changes made to federal restitution statutes in recent years requires that sections 3663, 3663A, and 3664 be reviewed again, in detail. The language of the restitution statutes is the basis of the principles discussed herein involving the scope of the offense, harm caused by the offense, and harms that are compensable as restitution. The suggested steps of analysis provide a sequential framework within which to work through the determination of *whether* and *how much* restitution should be imposed in all federal cases in which there are identifiable victims, according to the harms suffered by the victims of the offense.

For offenses where restitution is mandatory, the resulting amount must be imposed (although the court can consider the defendant's financial resources in setting or adjusting a payment schedule, where needed). For offenses in which restitution is discretionary, or imposable solely as a condition of supervision, the court must additionally balance the restitution imposable with consideration of the defendant's present and future financial resources. This second part of the restitution determination, and the enforcement of restitution order, will be the subject of future discussions.

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

EUNICE HOLT JONES
Chief
Federal Corrections and
Supervision Division

February 18, 1998

MEMORANDUM TO ALL: CHIEF PROBATION OFFICERS
CHIEF PRETRIAL SERVICES OFFICERS

Subject: Community Restitution Provision of the Mandatory Victims Restitution Act of 1996 (IMPORTANT INFORMATION)

When the Mandatory Restitution Act of 1996 was enacted on April 24, 1996, it included a provision for discretionary restitution to the community in certain drug offense cases based on the amount of public harm caused by the offense. 18 U.S.C. § 3663(c). However, the provision stipulated that before this type of restitution could be ordered, the United States Sentencing Commission was required to promulgate guidelines to assist the courts in determining the amount of community restitution. 18 U.S.C. § 3663(c)(7). In accordance with this mandate, effective November 1, 1997, the Sentencing Commission amended U.S.S.G. §5E1.1 giving the court discretion in determining the amount of restitution that may be ordered under this section. It states:

> In a case where there is no identifiable victim and the defendant was convicted under 21 U.S.C. § 841, 848(a), 849, 856, 861, or 863, the court, taking into consideration the amount of public harm caused by the offense and other relevant factors, shall order an amount of community restitution not to exceed the fine imposed under § 5E1.2.

In addition, the statute and the guidelines limit the amount of community restitution that may be imposed to an amount that does not "exceed the amount of the fine ordered." 18 U.S.C. § 3663(c)(2)(B). The financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependants, and other such factors as the court deems appropriate shall be considered by the court in determining whether to award this type of restitution. 18 U.S.C. § 3663(c)(1) and 18 U.S.C. § 3663(a)(1)(B)(I)(II). In addition, the statute specifically prohibits a community restitution award if it appears likely that such award would interfere with a forfeiture under 18 U.S.C. §§ 981, 982, or under the Controlled Substance

December 12, 1997

OFFICE FOR VICTIMS OF CRIME

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LEONIDAS RALPH MECHAM
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Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

BUNICE HOLT JONES
Chief
Federal Corrections and
Supervision Division

WASHINGTON, D.C. 20544

July 15, 1996

MEMORANDUM TO: CHIEF PROBATION OFFICERS
CHIEF PRETRIAL SERVICES OFFICERS

Subject: Additional Information on the Mandatory Victims Restitution Act of 1996 (INFORMATION)

To assist officers in implementing some of the new procedures required under the Mandatory Victims Restitution Act of 1996, staff from the Federal Corrections and Supervision Division, in consultation with the Office of General Counsel, are working on a sample victim notification letter and a new probation form--Affidavit of Victim Losses.

As you know, prior to submitting the presentence report to the court, the new section 3664(d)(2) of Title 18 requires the probation officer to provide notice to all identified victims. The law also provides the victim with an opportunity to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to the restitution. The new Affidavit of Victim Losses form should facilitate this requirement. To assist us in this effort, several districts have already submitted copies of locally developed notification letters and affidavit forms. We are incorporating those suggestions into our final product.

The new provisions of 18 U.S.C. § 3664 also require defendants to provide probation officers with an affidavit fully describing their financial resources, including a complete listing of all assets owned or controlled, as of the arrest date. The revised Probation Form 48 should help defendants meet this requirement.

We anticipate release of the new forms and the sample notification letter within the next 4-6 weeks, after they have been shared with the Department of Justice. In the meantime, if you have questions concerning the new Mandatory Victims Restitution Act, you may contact the Office of General Counsel at 202/273-1100 or Probation Administrator Kim M. Whatley at 202/273-1626.

Eunice K. Holt Jones

Eunice R. Holt Jones

ADVANCE COPY

LEONIDAS RALPH MECHAM
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CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

EUNICE HOLT JONES
Chief
Federal Corrections and
Supervision Division

WASHINGTON, D.C. 20544

August 12, 1996

MEMORANDUM TO ALL: CHIEF PROBATION OFFICERS
CHIEF PRETRIAL SERVICES OFFICERS

Subject: New Probation Forms for the Mandatory Victim Restitution Act of 1996
(INFORMATION)

To assist officers in implementing some of the new provisions under the Mandatory Victims Restitution Act of 1996, staff from the Federal Corrections and Supervision Division, in consultation with the Office of General Counsel, have developed the attached sample victim notification letter and the new Probation Form 72, Declaration of Victim Losses. The model letter and the new form should meet all of the criteria of the new legislation that requires the probation officer to provide notice to all identified victims and to provide them with an opportunity to file a separate affidavit relating to the amount of the victim's losses subject to restitution. The Explanation of Losses Subject to Restitution explains the new law and could be useful to victims who choose to exercise their right to declare losses.

The Probation Form 48A has also been revised to meet the provisions of 18 U.S.C. § 3664 that require defendants to provide probation officers with an affidavit fully describing their financial resources, including a complete listing of all assets owned or controlled, as of the arrest date. False information provided by a defendant could lead to prosecution for perjury in accordance with the provisions of 18 U.S.C. § 1621.

The affidavit indicated in section 3664(d) has been prepared as a declaration in accordance with 28 U.S.C. § 1746, which provides that any federal requirement for an affidavit may be satisfied by declaration. Unsworn declarations, under penalty of perjury, avoids the need for victims or defendants to locate and possibly pay for a notary public.

The new forms should be available at the Forms Distribution Center within the next several weeks. The attached forms may be reproduced in the meantime. If you have questions concerning the new Mandatory Victims Restitution Act, the forms, or the model letter, contact the Office of General Counsel at 202/273-1100 or Probation Administrator Kim M. Whatley at 202/273-1626.

Eunice R. Holt Jones

Eunice R. Holt Jones

Attachments

Sample Victim Notification Letter

July 15, 1996

Mr. John Doe
123 State Street, N.W.
Breaker Bay, Atlantis 22222

Re: *United States v. Smith*
Case Number 96CR-00001-001

Dear *Mr. Doe*:

The Mandatory Victims Restitution Act of 1996 provides that all identified victims directly and proximately harmed as a result of the commission of the offense in the above-entitled case receive notice of the following information:

On *June 30, 1996*, defendant *John Smith* was convicted of *mail fraud*. The sentencing hearing will be held on *August 15, 1996 at 9:00 a.m.*, at the United States District Court, located at *222 Broadway, Breaker Bay, Atlantis* before the Honorable *Kelly L. Green*. According to our records, you may be entitled to restitution in the amount of *$30,000*. However, our office cannot guarantee that restitution, or any particular amount of restitution will be awarded to you at sentencing. That determination will be made by the court.

You are invited to submit information concerning the amount of your losses to the below-signed probation officer. A complete explanation of the type(s) of compensation you may be entitled to receive is included with this letter. If you wish to have such information considered in the preparation of the presentence report, please contact me to confirm your losses no later than *July 30, 1996*.

The law also permits you to file a separate affidavit relating to the amount of loss subject to restitution. A declaration form which has the same legal effect as an affidavit but which need not be notized is enclosed. I will submit the declaration to the court on your behalf should you wish to exercise your right to submit such a form. However, the statute provides that the burden shall be on the attorney for the Government for demonstrating your losses as a result of the offense.

If you are awarded restitution by the court in this case, you may request the clerk of the court to issue an abstract of judgment certifying that a judgment has been entered in your favor in the amount specified in the order. Upon registering, recording, docketing, or indexing the abstract in accordance with the rules and requirements of the state of *Atlantis*, the abstract of judgment shall be a lien upon the property of the defendant located in *Atlantis* in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction of *Atlantis*. In the event you are awarded restitution, it is your responsibility to notify the United States Attorney's office in the this district and the court of any change in your mailing address while restitution is still owed. This information will be maintained confidentially.

In the event you have additional questions, please feel free to contact me at 202/262-1496.

Sincerely,

Michael Turner
U.S. Probation Officer

Enclosures

Explanation of Losses Subject to Restitution

The Mandatory Restitution Act of 1996 provides that you may be entitled to an order of restitution for certain losses suffered as a direct or proximate result of the commission of the offense for which the defendant was convicted. The types of losses for which the statute provides restitution are explained below. You have the right to explain these losses in detail in the attached affidavit form.

In the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense, the court may order: the return the property to the owner of the property or someone designated by the owner; or if return of the property is impossible, impractical, or inadequate, the court may order payment an amount equal to the greater of--the value of the property on the date of the damage, loss, or destruction, or the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned.

In the case of an offense resulting in bodily injury to a victim, the court may order: payment of an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; payment of an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and reimbursement to the victim for income lost by such victim as a result of such offense.

In the case of an offense resulting in bodily injury that also results in the death of a victim, the court may order payment of an amount equal to the cost of necessary funeral and related services.

In any case, the court may order reimbursement to the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

In any case, if the victim (or if the victim is deceased, the victim's estate) consents, the court may order the defendant to make restitution in services in lieu of money, or to make restitution to a person or organization designated by the victim or the estate.
(18 U.S.C. § 3663)

In addition, the victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments. (18 U.S.C. § 3664)

If a victim has received compensation from insurance of any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation. (18 U.S.C. § 3664)

PROB 7E
(7/93)

UNITED STATES DISTRICT COURT FOR THE

_____ DISTRICT OF _____

Declaration of Victim Losses

United States)
v.)
)
) _____
) (Case Number)

I, _____, residing at _____, in the city (or county) of _____, in the state of _____, am a victim in the above referenced case and I believe that I am entitled to restitution in the total amount of $_____.

My specific losses as a result of this offense are summarized as follows:

_____ I have been compensated by insurance or another source with respect to all or a portion of my losses in the amount of $_____. The name and address of my insurance company and the claim number for this loss are as follows:

I declare under penalty of perjury that the foregoing is true and correct.

_____
(Signature)

Executed on
_____ day of _____, _____.

(Additional Pages May be Attached)

PROB 48A
(Rev. 7/93)

UNITED STATES DISTRICT COURT FOR THE

_____ DISTRICT OF _____

Declaration of Defendant Personal Financial Statement

United States)
v.)
)
) _____
) (Case Number)

I, _____, residing at _____, in the city (or county) of _____, in the state of _____, have completed the attached Personal Financial Statement that fully describes my financial resources, including a complete listing of all assets owned or controlled by me as of the date of my arrest. The Personal Financial Statement also includes my financial needs and earning ability and the financial needs and earning ability of my dependents.

I declare under penalty of perjury that the foregoing is true and correct.

_____
(Defendant Signature)

Executed on
_____ day of _____, _____.

PROB 48A
(Rev. 7/88)

PERSONAL FINANCIAL STATEMENT

NOTE: I = Individual J = Joint

BANK ACCOUNTS (Include Savings & Loans, Credit Unions, Certificates of Deposit, IRA & KEOGH Accounts, etc.)

I/J	Name of Institution	Address	Type of Account	Account Number	Personal or Commercial	Balance

SECURITIES (Stocks in public and closely held corporations, bonds, mutual funds, U.S. Government securities, etc.)

I/J	Name of Company	Number of Units	How are they held?	Fair Market Value	Margin

REAL ESTATE (Include home equity loans under mortgage balance)

I/J	Address (Include county & state)	Purchase Date & Cost	Fair Market Value	Mortgage Balance	Monthly Payment	Date mortgage will be paid off

LIFE INSURANCE

Name of Company	Policy Number	Type	Face Amount	Cash Surrender Value	Amount Borrowed	Amount you can borrow on policy

MOTOR VEHICLES (Include cars, trucks, mobile homes, boats, airplanes, etc.)

I/J	Year, make & license number	Fair Market Value	Loan Balance	Monthly Payment	Date loan will be paid off

MORTGAGES HELD BY YOU

I/J	Person Paying You (name & address)	Mortgage Balance	Monthly Payment	Date Mortgage will be paid off	Balloon Payment?

OTHER ASSETS (Cash on hand or other things of value that you own or are buying—see instructions)

I/J	Description	Fair Market Value	Loan Balance	Monthly Payment	Date loan will be paid off

Price etc.
(Rev. 7/94)

Page 3 of ____

CHARGE ACCOUNTS & LINES OF CREDIT (Bank credit cards, lines of credit, revolving charge accounts, etc.)

H/J	Type of Account or Card	Credit Limit	Amount Owed	Credit Available	Minimum Monthly Payment

OTHER DEBTS (not included elsewhere)

H/J	Owed to	Relationship	Amount Owed	Owed For	Monthly Payment

MONTHLY INCOME	Yours	Spouse	Total
Net Salary			
Commissions			
Net Profit from business			
Net rental income			
Pensions			
Social Security			
Interest			
Dividends			
Alimony/child support			
Income of other dependents			
Other			
TOTAL INCOME			
CASH FLOW (Income less necessary expenses)			

NECESSARY MONTHLY EXPENSES	
Home Rent or Mortgage	
Utilities:	
Electric	
Heating Oil/Gas	
Water/Sewer	
Telephone	
Groceries, supplies	
Insurance:	
Auto	
Health	
Life	
Homeowners/renters	
Minimum installment payments	
Transportation	
Medical	
Clothing	
Alimony/child support	
Other	
TOTAL NECESSARY EXPENSES	

Within the last three years, have you encumbered or disposed of any assets or property with a cost or fair market value of more than $1,000? If so, give the following information: Date, Amount, Property Transferred or Encumbered, To whom?

Is anyone holding any assets on your behalf (include trusts of which you are a beneficiary)? If so, explain.

Are you the grantor or donor of any trust, or the trustee or fiduciary for any trust? If so, explain.

Do you receive, or under any circumstances expect to receive benefits, from any established trust, from a claim for compensation or damages, or from a contingent or future interest in property of any kind (i.e. inheritance, profit sharing or pension plan)? If so, explain.

Have you ever been involved in bankruptcy proceedings? If so, give date, place and details.

Have you ever been a party to any civil suit? If so, give date, place, persons involved and explain.

What is the prospect of an increase in value of assets or in present income (Please give general statement)?

INSTRUCTIONS FOR PERSONAL FINANCIAL STATEMENT

1. Attach additional pages if you need more space for any item.
2. Estimate fair market value for all assets (what they could be sold for).
3. "Individual" means assets or debts that are yours alone. "Joint" means assets or debts that you own or owe together with someone else.
4. "Other Assets" include cash on hand, copyrights, patents, interests in partnerships, jewelry, coins, precious metals, notes or accounts receivable, any monies owed to you by any person or entity, etc.
5. "Other Debts" include judgements, liens, delinquent tax assessments and support obligations, etc.
6. "Net Salary" is your gross pay minus required taxes, social security, and other deductions for *required* or *necessary* items *only*, (such as pensions and insurance). Do *not* deduct excess withholding taxes or voluntary savings allotments.
7. Under "Monthly Income" include the total net income received by your spouse and any other dependents living with you. For non-dependents living with you, show only what they pay you or contribute toward the household expenses.
8. "Net Profit from Business" and "Net Rental Income" should be calculated in the same manner as in preparing a federal income tax return, except that depreciation and other non-cash expenses should *not* be deducted.
9. Under "Necessary Monthly Expenses" show only those that are necessary for your continued employment, your basic health and welfare, or that of your dependents.

NOTES

PROB 48B
(12/87) ●

REQUEST FOR FINANCIAL RECORDS

DEFENDANT'S FULL NAME	DOCKET NUMBER

To help us with our presentence report, please furnish us with all of the papers that have been checked.

- ☐ Copies of Federal Income Tax Returns for the last 5 years. Please provide a written explanation for any returns not filed or provided.
- ☐ Most recent bank statements, including cancelled checks, for all accounts.
- ☐ Securities or brokerage statements.
- ☐ Lease agreement or mortgage and most recent mortgage statement.
- ☐ Most recent billing statements for credit cards or other charge accounts.
- ☐ Certificates of deposit or most recent savings account and credit union statements.
- ☐ Copy of Trust Agreement.
- ☐ Bankruptcy documents including petition, financial statements submitted, final judgement, etc.
- ☐ Insurance bills (car, health and life).
- ☐ Any financial statement submitted to anyone in the past three years.
- ☐ Bills documenting necessary living expenses such as phone, gas and electric, oil, groceries, water/sewer, car expenses and gasoline.
- ☐ Copy of loan statements (including motor vehicle payment book and lines of credit).
- ☐ Copy of paystubs or documentation of other income (social security, unemployment compensation, child support/alimony, pensions, for both yourself and your spouse).
- ☐ Lease agreement (for rental income) and documentation of rental expenses including copy of mortgage.
- ☐ Copy of homeowners insurance.
- ☐ Documentation of medical expenses.
- ☐ Court orders verifying court ordered obligations.
- ☐ Other:

ADDITIONAL INSTRUCTIONS:

A personal interview has been scheduled for you with:

_____ on _____
U.S. Probation Officer — Date

at _____ Office location: _____
Time

_____

_____

Telephone: _____

PROB 48C
(12/87) •

FINANCIAL WORKSHEET

	Percentage Owned/Owed	Joint Owners/Debtors	Net Amount
Cash:			
Cash on hand			_____
Bank Accounts:			
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Unencumbered Assets (Owned free and clear):			
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Equity in other Assets (Market value less mortgages and other liens):			
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Total Assets			_____
Less: Unsecured Debts (Not secured by mortgages or other liens):			
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Total Unsecured Debts			< _____ >
Equals: Net Worth			_____
Monthly Cash Flow (net income minus necessary expenses)			_____

Other Resources (sources for loans or cash advances, likely increases in income or assets, likely decreases in expenses or obligations, regular expenditures for luxury items, estimate of true earning ability, etc.)

ADVANCE COPY

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

EUNICE HOLT JONES
Chief
Federal Corrections and
Supervision Division

May 31, 1996

MEMORANDUM TO: UNITED STATES PROBATION OFFICERS
UNITED STATES PRETRIAL SERVICES OFFICERS

Subject: Antiterrorism and Effective Death Penalty Act of 1996
(Pub. L. No. 104-132, title II, 110 Stat. 1214, 1227 (April 24, 1996))
(INFORMATION)

The President signed the above reference legislation on April 24, 1996. Title II of the law is entitled the Mandatory Victims Restitution Act of 1996 (the "Act") and contains many new criminal monetary penalty provisions that will impact the work of probation officers. Below are highlights of the Act intended to provide guidance to officers who must make initial determinations of the applicability of the new provisions in preparing presentence reports. Appendix A contains all relevant sections in amended form. The new material appears in italics.

The effective date section for the mandatory restitution provisions stipulate that "to the extent constitutionally permissible," they will "be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act." Ultimately, of course, it will be up to your courts to interpret this provision as well as the other provisions of the Act, but for the purpose of preparing presentence reports, this memorandum will attempt to provide some initial guidance. It is the view of the Office of General Counsel that provisions of the new legislation that provide for the imposition of restitution in cases in which restitution could not be ordered in the past, or that require full restitution in cases in which the court previously had discretion in ordering restitution, are applicable only to offenders whose offenses were committed after April 24, 1996 because they impose new, or more onerous, monetary penalties. As you know, the ex post facto clause of the United States Constitution bars application of a penalty that is harsher than that applicable to the offense at the time it was committed.

However, some of the amendments, such as the provisions requiring the inclusion of information in the presentence report to determine restitution, appear to be administrative in nature. These provisions should be effective in proceedings for cases in which the conviction was rendered on or after April 24, 1996.

62-438 D-00--5

Mandatory Victim Restitution

The most significant provisions of the Act are those that require the court to order full restitution in certain cases. The Act creates a new section 3663A of title 18, United States Code, which requires the court to enter a restitution order for each defendant who has been found to have committed:

- a crime of violence (as defined in 18 U.S.C. § 16);
- an offense against property (including any offense committed by fraud or deceit); or
- a crime related to tampering with consumer products (18 U.S.C. § 1365);

when there is an identifiable victim who suffers a physical injury or pecuniary loss.

Restitution orders under new section 3663A must be entered without consideration of the defendant's ability to pay (and without consideration of the costs of collection efforts to the Department of Justice or the judiciary). There is one exception to mandatory restitution in the new provisions. Only in cases in which the offense is against property may the court decline to order restitution if the number of identifiable victims is so large as to make restitution impracticable, or if the burden on the sentencing process caused by the determination of complex issues of fact in connection with restitution would outweigh the need to provide restitution to the victim.

"Discretionary" Restitution

Section 3663 of title 18, United States Code was amended to permit restitution in a drug offense, and includes specific provisions for how such restitution would be distributed. The provision stipulates, however, that restitution is not authorized for drug offenses until the United Sentencing Commission promulgates guidelines to effect the provision.

The definition of victim is also amended to permit restitution to "a person directly and proximately harmed as a result of the commission of an offense" and includes victims of a scheme, conspiracy, or pattern of criminal activity in a case in which the offense involves as an element a scheme, conspiracy, or pattern of criminal activity. Prior law only permitted restitution for direct losses caused by the offense. This definitionn permits restitution for losses "proximately" caused by the offense as well as those directly caused. Undoubtedly, this expands the authority of the court to order restitution, but to what extent must be determined through litigation. The same definition is included in new section 3663A.

Restitution Order and Presentence Reports

The provisions of 18 U.S.C. § 3664, regarding the procedures for issuance and enforcement of restitution orders, has been completely rewritten. Included are administrative changes requiring that a probation officer include in the presentence report (or separate report, in cases in which presentence reports have not been ordered by the court) a complete accounting of the losses to each victim. If the number or identity of victims cannot be reasonably ascertained or other circumstances exist that make this requirement clearly impracticable, the new provisions require the probation officer to notify the court.

Section 3664(d)(1) permits the probation officer to request that the attorney for the Government (not later than 60 days prior to the date initially set for sentencing), to provide a listing of the amounts subject to restitution. Section 3664(d)(3) requires each defendant to provide the probation officer with an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested.[1]

Prior to submitting the presentence report to the court, section 3664(d)(2) requires the probation officer to provide notice to all identified victims. Such notification can be letter form and should include:

- the offense(s) of which the defendant was convicted;
- the amounts subject to restitution;
- the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;
- the schedule date, time, and place of the sentencing hearing;
- the availability of a lien in favor of the victim pursuant to subsection(m)(1)B); and
- the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to the restitution

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[1] The new requirement that the defendant submit an affidavit attesting to financial resources may be the type of requirement covered by 28 U.S.C. § 1746. Under that section, if a matter is required by law to be supported by an affidavit and the affidavit includes the declaration set out in that section, a false statement could result in a prosecution for perjury pursuant to 18 U.S.C. § 1621. If an officer believes that a required affidavit contains false allegations, the officer, with the permission of the court should refer the matter to the United States Attorney's office.

If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, section 3664(d)(5) provides that the attorney for the Government or the probation officer must notify the court and the court should set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. In certain circumstances, the victim may petition the court for an amended restitution order if the victim discovers additional losses.

Section 3664(d)(6) allows the court to refer any issues arising in connection with a proposed order of restitution to a magistrate judge or a special master for proposed findings of fact and recommendations as to disposition. If there is a dispute with regard to the amount or type of restitution, section 3664(e) provides that the issue shall be resolved by the court by the preponderance of the evidence. The burden is on the Government to demonstrate the amount of the losses sustained by a victim.

Section 3664(f) contains provisions directing the court to establish the manner in which restitution must be paid. Courts, upon ordering restitution, are required to set a payment schedule or require a lump sum payment, but if the court finds that the defendant cannot pay restitution, the court may order payment under a schedule of nominal payments.[2]

Section 3664(k) requires the defendant to report material changes in his or her economic circumstances that might affect the ability to pay restitution, and the court is authorized to amend the payment requirements accordingly. In addition, the new provisions remove the time limits (in the old 18 U.S.C. §§ 3572(d) and 3663(f)(1)) over which the court may schedule fine and restitution payment and replaces theses provisions with a requirement that the payment period be the shortest period in which the debt can reasonably be paid.

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[2] While these provisions are subject to court interpretation, the requirement that the court set a payment schedule might preclude the practice in some districts that relies on former section 3663(f)(3) which provides that unless the court orders otherwise restitution is payable immediately. Although payable immediately, probation officers in these districts worked with offenders to effect payment as soon as practicable. See Memorandum to United States Probation Officers from Eunice R. Holt Jones, dated September 1, 1995, pp. 5-6.

Other Provisions

Additional provisions in 18 U.S.C. §§ 3611 and 3612 authorize interest and penalty provisions for restitution and new provisions designed to facilitate monetary penalty collections are added to 18 U.S.C. §§ 3613, 3613A, and 3614.

The restitution provisions of 18 U.S.C. §§ 2248, 2259, 2264, and 2327 authorized in the Violent Crime Control and Law Enforcement Act of 1994 are all amended with the new legislation to remove the exception to the mandatory restitution provisions of those sections and to conform those sections with the new 18 U.S.C. §§ 3663A and 3664. Likewise, conforming amendments are made to F.R.Crim.P. 32 and to 18 U.S.C. §§ 3563 and 3572.

Finally, the $50 special assessment requirement in 18 U.S.C. § 3013 for felony offenses has been increased to not less than $100 if the defendant is an individual and not less than $400 if the defendant is a person other than an individual. Because this provision imposes a greater monetary penalty than the previous provision it likely applies only to offenses committed after to April 24, 1996.

The U.S. Sentencing Commission is instructed to promulgate guidelines to reflect the amendments. Moreover, the Attorney General is instructed to amend Department of Justice guidelines to consider the needs of victims in plea negotiations and to ensure full enforcement of restitution orders.

Questions concerning the new legislation may be directed to the Office of General Counsel or to Probation Administrator Kim M. Whatley at 202/273-1626.

Eunice R. Holt Jones

Attachment

cc: Chief Judges, United States District Courts
Clerks, United States District Courts

Relevant Sections of
The Antiterrorism and Effective Death Penalty Act of 1996
Public L. No. 104-132, title II, 110 Stat. 1214, 1227
(April 24, 1996)
(In Amended Form)

Attachment A

Amendments to the Restitution Provisions

The following reflect the changes made to the restitution provisions of title 18, United States Code and the Rules of Criminal Procedure by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132, title II, 110 Stat. 1214, 1227 (April 24, 1996)). All relevant sections, including 3663, 3663A, and 3664 appear in amended form; new material appears in italics.

§ 3663. Order of restitution

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section *401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section),* or section 46312, 46502, or 46504 of title 49, *other than an offense described in section 3663A(c),* may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, *or if the victim is deceased, to the victim's estate.*

(2) For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(B)(i) The court, in determining whether to order restitution under this section, shall consider--

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(b) The order may require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of--

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B) (i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine ordered for the offense charged in the case.

(3) Restitution under this subsection shall be distributed as follows:

(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.-

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

(A) that is--

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable--

(A) provide notice to all identified victims of--
(i) the offense or offenses of which the defendant was convicted;
(ii) the amounts subject to restitution submitted to the probation officer;
(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;
(iv) the scheduled date, time, and place of the sentencing hearing;
(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and
(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets

owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of--

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and
(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump- sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of--
(A) return of property;
(B) replacement of property; or
(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in--

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that--

(1) such a sentence can subsequently be--
(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;
(B) appealed and modified under section 3742;
(C) amended under section 3664(d)(3); or
(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

Amendments to the Conditions of Probation

The following reflects the changes made to the probation provisions of title 18, United States Code 3563; new material appears in italics.

§ 3563 Conditions of Probation

(a) Mandatory conditions.--The court shall provide, as an explicit condition of a sentence of probation--

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation;

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection(b)(2), (b)(3), or (b)(13), unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under subsection (b);

(3) for a felony, a misdemeanor, or an infraction, that the defendant not unlawfully posses a controlled substance;

(4) for a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant;

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

(5) The results of the drug test administered in accordance with paragraph (4) shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A defendant who tests positive may be detained pending verification of a positive drug test result. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3565(b), when considering any action against a defendant who fails a drug test administered in accordance with paragraph (4); and

(6) that the defendant--

(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3013; and

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

(b) Discretionary conditions.--The court may provide as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the facts set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant--

(1) support his dependents and meet other family responsibilities;

(2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A));

(3) give the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(4) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(5) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(6) refrain from frequenting specified kings of places or from associating unnecessarily with specified persons;

(7) refrain from excess use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

(10) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation;

(11) reside at, or participate in the program of, a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all of the term of probation;

(12) work in community service as directed by the court;

(13) reside in a specific place or area, or refrain from residing in a specified place or area;

(14) remain within the jurisdiction of the court, unless granted to leave by the court or a probation officer;

(15) report to a probation officer as directed by the court or the probation officer;

(16) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(18) notify the probation officer promptly if arrested or questioned by a law enforcement officer;

(19) remain at his place of residence during nonworking hours and, if the court finds it appropriate, that compliance with this condition be monitored by telephonic or electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration;

(20) comply with the terms of any court order or order of an administrative process pursuant to the law of the State, the District of Columbia, or any other possession or territory of the United States, requiring payment by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living; or

(21) satisfy such other conditions as the court may impose.

Amendment of the Federal Rules of Criminal Procedure

Rule 32(b) of the Federal Rules of Criminal Procedure has been amended. All relevant sections appear in amended form; new material appears in italics.

Rule 32. Sentence and Judgment

(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence Investigation and Report.

(1) When Made. The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

Notwithstanding the preceding sentence a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.

(2) Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) Contents of the Presentence Report. The presentence report must contain;

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;
(B) the classification of the offense and the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence--within or without the applicable guideline--that would be more appropriate, given all the circumstances;
(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);
(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;
(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;
(F) in appropriate cases, information sufficient for the court to enter an order of restitution;
(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 352(b); and
(H) any other information required by the court.

Amendments to the Fine Provisions

Section 3572 of title 18, United States Code, is amended to include restitution in various payment provisions and, in subsection (b), to exempt restitution against the United States from the requirement that the court not impose a fine that will impair the defendant's ability to pay restitution. All relevant sections appear in amended form; new material appears in italics.

§ 3572 Imposition of a sentence of fine and related matters

(b) Fine not to impair ability to make restitution.–If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, *other than the United States,* the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

(c) Effect of finality of judgment.–Notwithstanding the fact that a sentence to pay a fine can subsequently be–

(1) modified or remitted under section 3573;
(2) corrected under rule 35 of the Federal Rules of Criminal Procedure and section 3742; or
(3) appealed and modified under section 3742;

a judgment that includes such a sentence is a fine judgment for all other purposes.

(d) Time, method of payment, and related items.–

(1) A person sentenced to pay a fine or other monetary penalty, *including restitution,* shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule.

(2) If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made.

(3) A judgment for a fine which permits payments in installments shall include a requirement that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine. Upon receipt of such notice the court may, on its own motion or the motion of any party, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(e) Alternative sentence precluded.--At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be carried out is the fine is not paid.

(f) Responsibility for payment of monetary obligation relating to organization.--If a sentence includes a fine, special assessment, *restitution*, or other monetary obligation (including interest) with resect to an organization, each individual authorized to make disbursements for the organization has a duty to pay the obligation form assets of the organization. If such an obligation is imposed on a director, officer, shareholder, employee, or agent of the organization, payments may not be made, directly or indirectly, from assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) Security for stayed fine.--If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)--

(1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;
(2) require the defendant to provide a bond or other security to ensure payment of the fine; or
(3) restrain the defendant from transferring or dissipating assets.

(h) Delinquency.--A fine *or payment of restitution* is delinquent is a payment is more than 30 days late.

(i) Default.--A fine *or payment of restitution* is default if a payment is delinquent for more than 90 days. *Notwithstanding any installment schedule, when a fine or payment of restitution is in default, the entire amount of the fine or restitution is due within 30 days after notification of the default, subject to the provisions of section 3013A.*

Other Amendments to Fine Payment Provisions

Sections 3611-3613 of title 18, United States Code, are amended to include restitution in various payment provisions. All relevant sections appear in amended form; new material appears in italics.

§ 3611. Payment of a fine *or restitution*.

A person who is sentenced to pay a fine, *assessment, or restitution shall pay the fine, assessment, or restitution* (including interest or penalty) as specified by the Director of the Administrative Office of the United States Courts. Such Director may specify that such payment of made to the clerk of the court or in the manner provided for under section 604(a)(18) of title 28, United States Code.

§ 3612. Collection of an unpaid fine *or restitution*.

(b) Information to be included in judgment; judgment to be transmitted to Attorney General.–(1) A judgment or order imposing, modifying, or remitted a fine *or restitution order* of more than $100 shall include–

(A) the name, social security number, account number, mailing address, and residence address of the defendant;
(B) the docket number of the case;
(C) the original amount of the fine *or restitution* and the amount that is due;
(D) the schedule of payments (if other than immediate payment is permitted under section 3572(d);
(E) a description of any modification or remission;
(F) if other than immediate payment is permitted, a requirement that until the fine *or restitution* is paid in full, the defendant notify the Attorney General of any change in the mailing address or residence address of the defendant not later than thirty days after the change occurs.
(G) in the case of a restitution order, information sufficient to identify each victim to whom restitution is owed. It shall be the responsibility of each victim to notify the Attorney General, or the appropriate entity of the court, by means of a form to be provided by the Attorney General or the court, of any change in the victim's mailing address while restitution is still owed the victim. The confidentially of any information relating to a victim shall be maintained.

(2) Not later than ten days after entry of the judgment or order, the court shall transmit a certified copy of the judgment or order to the Attorney General.

(c) Responsibility for collection.–The Attorney General shall be responsible for the collection of any unpaid fine *or restitution* concerning which a certification has been issued as provided in subsection (b). An order of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid. *Any money received from a defendant shall be disbursed so that each of the following obligations is paid in full in the following sequence:*

(1) A penalty assessment under section 3013 of title 18 United States Code;
(2) Restitution to all victims.
(3) all other fines, penalties, costs, and other payments required under the sentence.

(d) Notification of delinquency.–Within ten working days after a fine *or restitution* is determined to be delinquent as provided in section 3572(h), the Attorney General shall notify the person whose fine *or restitution is delinquent, to inform the person of the delinquency.*

(e) Notification of default.--Within ten working days after a fine or restitution is determined to be default, the Attorney General shall notify the person whose fine *or restitution is in default* and the entire unpaid balance, including interest and penalties, is due within thirty days.

(f) Interest on fines *and restitution*.

(1) In general.--The defendant shall pay interest on any fine *or restitution* of more than $2,500, unless the fine *or restitution* is paid in full before the fifteenth day after the date of the judgment. If that day is a Saturday, Sunday, or legal public holiday, the defendant shall be liable for interest beginning with the next day that is not a Saturday, Sunday, or legal public holiday.

(2) Computation.--Interest on a fine *or restitution* shall be computed--

(A) daily (from the first day on which the defendant is liable for interest under paragraph (1); and

(B) at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled before the first day on which the defendant is liable for interest under paragraph (1).

(3) Modification of interest by court. If the court determines that the defendant does not have the ability to pay interest under this subsection, the court may--

(A) waive the requirement for interest;

(B) limit the total of interest payable to a specific dollar amount; or

(C) limit the length of the period during which interest accrues.

(g) Penalty for delinquent fine *or restitution*.--If a fine *or restitution* becomes delinquent, the defendant shall pay, as a penalty, an amount equal to 10 percent of the principal amount that is delinquent. If a fine *or restitution* becomes in default, the defendant shall pay, as a penalty, an additional amount equal to 15 percent of the principal amount that is in default.

(h) Waiver of interest or penalty by Attorney General.--The Attorney General may waive all or part of any interest or penalty under this section or any interest or penalty relating to a fine imposed under any prior law, if, as determined by the Attorney General, reasonable efforts to collect the interest or penalty are not likely to be effective.

(i) Application of payments.--Payments relating to fines *and restitution* shall be applied in the following order: (1) to principal; (2) to costs; (3) to interest; and (4) to penalties.

§ 3613. Civil remedies for satisfaction of any unpaid fine

(a) Enforcement.--The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined, except that--

1) property exempt from levy for taxes pursuant to section 6334(a)(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the Internal Revenue Code of 1986 shall be exempt from enforcement of the judgment under Federal law;
2) section 3014 of chapter 176 of title 28 shall not apply to enforcement under Federal law; and
(3) the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) shall apply to enforcement of the judgment under Federal law or State law.

(b) Termination of Liability.--The liability to pay a fine shall terminate the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined.

(c) Lien.--A fine imposed pursuant to the provisions of sub-chapter C of chapter 227 of this title, or an order of restitution made pursuant to sections 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b).

(d) Effect of Filing Notice of Lien.--Upon filing of a notice of lien in the manner in which a notice of tax lien would be filed under section 6323(f)(1) and (2) of the Internal Revenue Code of 1986, the lien shall be valid against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor, except with respect to properties or transactions specified in subsection (b), (c), or (d) of section 6323 of the Internal Revenue Code of 1986 for which a notice of tax lien properly filed on the same date would not be valid. The notice of lien shall be considered a notice of lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. A notice of lien that is registered, recorded, docketed, or indexed in accordance with the rules and requirements relating to judgments of the courts of the State where the notice of lien is registered, recorded, docketed, or indexed shall be considered for all purposes as the filing prescribed by this section. The provisions of section 3201(e) of chapter 176 of title 28 shall apply to liens filed as prescribed by this section.

(e) Discharge of Debt Inapplicable.--No discharge of debts in a proceeding pursuant to any chapter of title 11, United States Code, shall discharge liability to pay a fine pursuant to this section, and a lien filed as prescribed by this section shall not be voided in a bankruptcy proceeding.

(f) Applicability to Order of Restitution.--In accordance with section 3664(m)(1)(A) of this title, all provisions of this section are available to the United States for the enforcement of an order of restitution.

§ 3613A. Effect of default

(a)(1) Upon a finding that the defendant is in default on a payment of a fine or restitution, the court may, pursuant to section 3565, revoke probation or a term of supervised release, modify the terms or conditions of probation or a term of supervised release, resentence a defendant pursuant to section 3614, hold the defendant in contempt of court, enter a restraining order or injunction, order the sale of property of the defendant, accept a performance bond, enter or adjust a payment schedule, or take any other action necessary to obtain compliance with the order of a fine or restitution.

(2) In determining what action to take, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the fine or restitution order, and any other circumstances that may have a bearing on the defendant's ability or failure to comply with the order of a fine or restitution.

(b)(1) Any hearing held pursuant to this section may be conducted by a magistrate judge, subject to de novo review by the court.

(2) To the extent practicable, in a hearing held pursuant to this section involving a defendant who is confined in any jail, prison, or other correctional facility, proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other communications technology without removing the prisoner from the facility in which the prisoner is confined.

§ 3614. Resentencing upon failure to pay a fine *or restitution*

(a) Resentencing.--Subject to the provisions of subsection (b), if a defendant knowingly fails to pay a delinquent fine *or restitution* the court may resentence the defendant to any sentence which might originally have been imposed.

(b) Imprisonment.--The defendant may be sentenced to a term of imprisonment under subsection (a) only if the court determines that--

(1) the defendant willfully refused to pay the delinquent fine *or restitution* or had failed to make sufficient bona fide effort to pay the fine *or restitution*; or

(2) in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence.

(c) Effect of Indigency.--In no event shall a defendant be incarcerated under this section solely on the basis of inability to make payments because the defendant is indigent.

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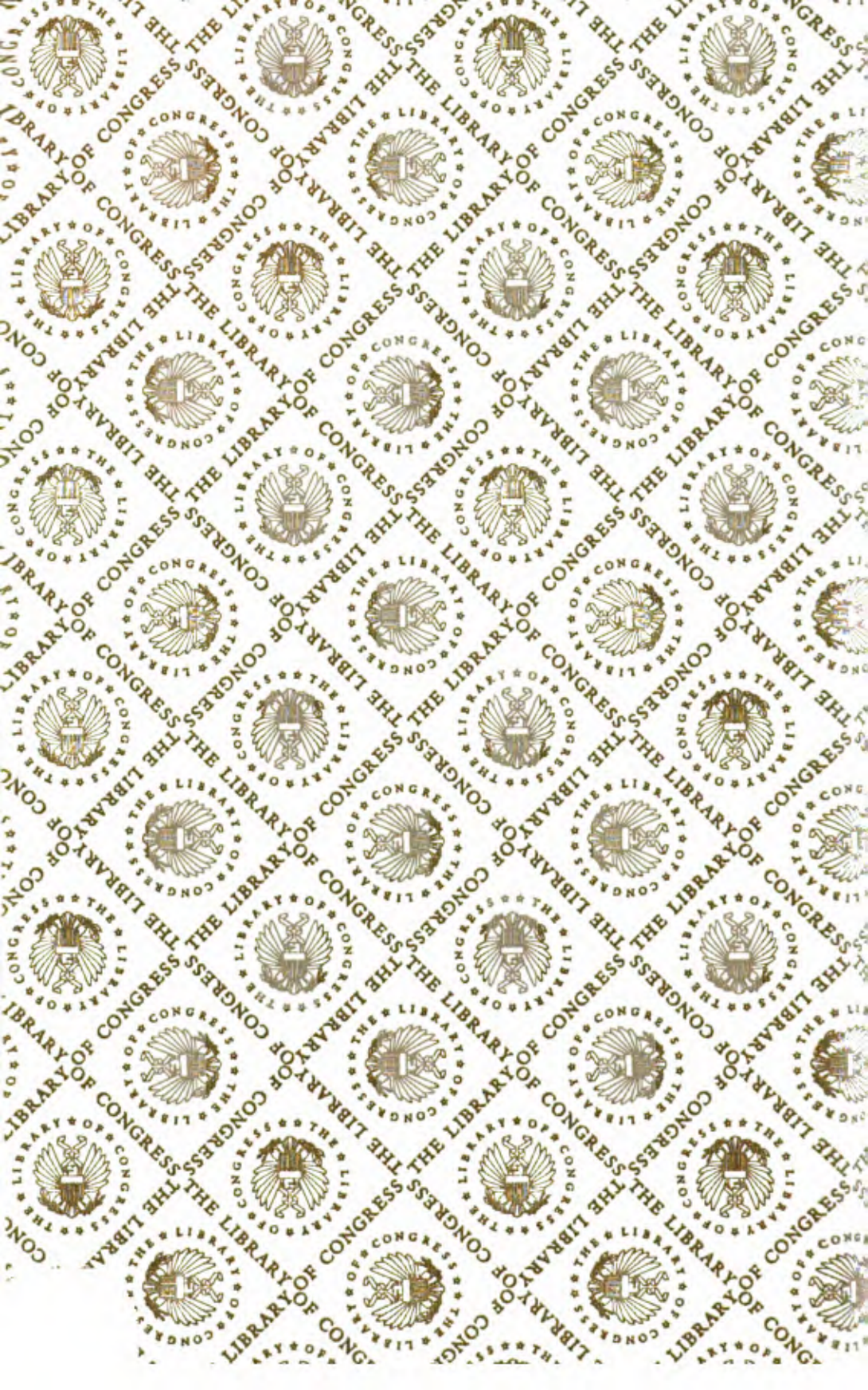
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